Supreme Court, U.S.
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No. 01-____

In The
Supreme Court of the United States
October Term, 2001

WILLIAM J. DEVINE, THERESA DEVINE,
and JOHN DEVINE,
a minor by and through his parents,
William J. Devine and Terry Devine,
Petitioners,

v.

INDIAN RIVER COUNTY SCHOOL BOARD,
Respondent.

Petition For a Writ of Certiorari
To The United States Court of Appeals
For the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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October 26, 2001

QUESTION PRESENTED

On appeal of the result of a due process hearing conducted pursuant to the Individuals with Disabilities in Education Act, 20 U.S.C. § 1415(f), does 20 U.S.C. § 1415(i)(2)(B) permit a federal district court to require the parties to re-offer live testimony and evidence rather than review the record of the administrative hearing?

All parties to the proceeding below are listed in the caption.

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Petitioners,

v.

INDIAN RIVER COUNTY SCHOOL BOARD,
Respondent.

Petition For a Writ of Certiorari
To The United States Court of Appeals
For the Eleventh Circuit

William Devine, Theresa Devine and John Devine petition the Court to grant the writ of certiorari to review the decision of the United

States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 249 F.3d 1289, and appears in the Appendix to this Petition ("Pet. App.") at 1a to 9a. The district court ruling is not reported, and appears at Pet. App. 10a. The decision of the administrative hearing officer is not reported, and appears at Pet. App. 19a.

JURISDICTION

The judgment of the Court of Appeals was entered on May 2, 2001 and the Court of Appeals denied petitioner's motion for rehearing on July 27, 2001. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

20 U.S.C. § 1415(i)(2)(B) provides as follows:

> In any action brought under this paragraph, the court--
>
> (i) shall receive the records of the administrative proceedings;
>
> (ii) shall hear additional evidence at the request of a party; and
>
> (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

Section 615 of the Individuals with Disabilities in Education Act is set forth at Pet. App. 67a.

STATEMENT

Petitioner John Devine is the autistic son of petitioners William J. Devine and Theresa Devine. When this dispute arose, John Devine attended the public schools operated by respondent Indian River County School Board. Respondent acknowledged that John Devine was a disabled child under the Individuals with Disabilities in Education Act ("IDEA"), and proposed an individual education program ("IEP"), as required by the statute, for the 1992-93 school year. William and Theresa Devine believed that the proposed IEP was insufficient to meet John's needs and did not constitute a free appropriate public education within the meaning of the IDEA. When the parties were unable to agree on an appropriate IEP, the Devines initiated a due process hearing as provided for by 20 U.S.C. § 1415(f).

Pursuant to the IDEA and Florida state and administrative law, a due process hearing regarding the appropriateness of respondent's proposed IEP was held in front of an administrative hearing officer. The due process hearing consisted of a full trial lasting four days from April 12, 1993 through April 15, 1992. During the trial, petitioners presented 4 witnesses and 45 exhibits and respondent presented 8 witnesses and 43 exhibits. Both parties had a full opportunity to present evidence, to conduct direct and cross-examinations, make argument, and to file proposed findings of fact and separate legal memoranda. Throughout the course of preparing for and conducting the due process trial, the Devines engaged in 6 months of discovery, spent over 1,000 hours of time and incurred approximately $50,000 in legal expenses.

Following the due process trial, the hearing officer issued a 49-page decision containing 97 specific findings of fact and conclusions of law and ruling that the school's

proposed IEP did not offer John Devine a free appropriate education under IDEA and ordering respondent to revise the IEP to address the deficiencies described in the order. By obtaining a ruling that the school's proposed IEP was inadequate, the Devines became one of a small fraction of families to prevail in an IDEA due process case in Florida. Respondent sought review of the due process hearing decision by suing the Devines in Florida state court. Petitioners removed that action and, on October 21, 1993, filed this case in the United States District Court for the Southern District of Florida, seeking damages, fees and costs and additional eligibility and relief under the IDEA. Respondent counterclaimed, seeking reversal of the hearing officer's order requiring an IEP that increased its obligations to John Devine.

Since the IDEA clearly provides that, on review of a due process hearing decision, a federal district court is required to base his decision primarily on the "records of the administrative proceeding" and may only take "additional evidence at the request of a party," both the Devines and respondent prepared only to present the court with limited additional evidence to supplement the administrative record. The district court, however, instructed the parties that it would not review and rely on the administrative record, which it referred to as mostly "fat" or "extraneous, irrelevant or unnecessary material." Rather, the district court stated that it would require the parties to re-try the case by bringing in live witnesses. When both parties informed the court that they had not prepared to re-offer any of the testimony or evidence presented at the due process hearing, the court stated "I think you ought to try this case as if this is the trial" and

that the parties should present the court with enough for it to be able to make a decision on "this alone."

Petitioner objected to the court forcing the parties to re-try the whole case, arguing that the IDEA established a procedure whereby the federal district court reviews the administrative record of the due process hearing and the parties only present "additional evidence." The court overruled petitioners' objection and again insisted on seeing all the live testimony itself. The court characterized the IDEA procedure as the lawyers attempting to "hand a box full of materials with the record below and go skipping off to Miller time while the court sits there and reads through it page by page..." which it found "unpalatable."

Petitioners' counsel had agreed to represent the Devines under a contingency fee arrangement with the understanding that the federal district court review, as outlined by the IDEA, would only involve the presentation of supplemental evidence and argument. Upon being informed that the parties would be required to conduct a full-blown trial in the federal district court, involving all the witnesses and evidence, counsel informed petitioner that he would not be able to afford to continue with the representation on a contingency fee basis. After agreeing that neither counsel nor petitioners could afford the cost of proceeding with a second lengthy trial, petitioners filed a motion to permit counsel to withdraw and to permit them to proceed pro se. The court refused to allow petitioners to proceed pro se and petitioners filed an appeal from the court's order, arguing that a parent should be permitted to represent his child on appeal of an IDEA due process hearing in federal court. The Eleventh Circuit affirmed and this Court denied certiorari.

Following the procedures mandated by the federal district court, the parties proceeded with a virtual re-trial of the due process hearing, lasting 5 days and generating a trial transcript of 668 pages. During the trial, respondent presented 6 witnesses, 4 of which had already given virtually the same testimony at the administrative due process trial. Because of, among other things, the cost involved, petitioners were unable to re-call most of their witnesses from the due process hearing, including their expert witness. The cost of fighting respondent's appeal through the 5-day district court trial dramatically raised the legal expenses incurred by petitioners.

On July 30, 1999, the district court issued a 10-page decision, reversing the administrative hearing officer's finding that respondent's IEP did not satisfy the IDEA's requirement of a free appropriate public education. While the court's decision made a few token references to the administrative record, it is clear from its instructions to the parties and several factual errors directly contradicting the undisputed evidence contained in the record that the court did not read or give any weight to the overwhelming majority of the administrative record. The court's 10-page decision also failed to address or rebut the vast majority of the 97 specific findings of fact and conclusions of law contained in the well-reasoned, 49-page decision issued by the hearing officer.

Petitioners appealed to the United States Court of Appeals for the Eleventh Circuit, arguing, among other things, that the district court erred in requiring the re-presentation of all testimony and evidence and, correspondingly, in refusing to base his decision on a review of the administrative record (along with any additional evidence the parties had). On May 2, 2001, the

Eleventh Circuit affirmed, approving of the procedure followed by the district court by ruling that it "was within the district court's discretion to prefer live testimony" to reviewing the record. 249 F.3d at 1291, n.1. Petitioner moved for rehearing which the Eleventh Circuit denied on July 27, 2001.

REASONS FOR GRANTING THE WRIT

The District Court's Decision to Require the Parties to Re-Try the IDEA Due Process Hearing Rather than Review and Base the Decision Upon the Administrative Record is in Sharp Conflict With the Statutory Provisions Governing Review of Due Process Hearings and With Decisions of other Federal Circuits and Makes it Nearly Impossible for a Parent to Afford to Pursue an IDEA Action to a Final Judgment

The Court should grant certiorari in this case because the decision below runs contrary to the clear provisions of the IDEA and sanctions a dramatic departure from the procedure and standards for federal district court review of IDEA due process hearings mandated by the IDEA and followed by other federal circuits. One of the crucial objectives of the IDEA is to ensure that the process for pursuing a free appropriate public education for children with disabilities is affordable to parents. The unfortunate reality of IDEA litigation, however, is that very few parents can afford to retain counsel, engage in discovery, obtain experts and conduct a trial to challenge an inadequate IEP in an administrative due process hearing. The only realistic hope most parents have of finding counsel to represent them in a due process hearing is the possibility of a contingency fee arrangement or obtaining

attorneys fees as a prevailing party. If, following an already lengthy and costly trial in front of an administrative officer, the rare parent who has managed to prevail at a due process hearing can be forced to conduct a full re-trial in a federal district court in order to secure an appropriate IEP and fees as the prevailing party, the total cost of pursuing an IDEA action to a final judgment would be prohibitive for virtually all parents. Just as significantly, the prospect of having to re-litigate the result of a due process hearing in federal court would deter most attorneys from accepting representation in an IDEA due process hearing on a contingency basis in the first place. Thus, the main effect of the decision below is to sanction a procedure for review of IDEA due process hearings that increases the cost of pursuing an IDEA action to a final judgment so dramatically that most parents will simply be unable to afford to protect their children's interests in Court, thus undermining the enforcement of the IDEA.

In addition, certiorari would be particularly appropriate because the decision in this case drastically sharpens the split among circuits regarding the appropriate standard of and procedures for review of an IDEA due process hearing, both on the issue of how much "additional evidence" a federal court may accept and how much deference a federal court must give to the decision of the administrative hearing officer.

1. The IDEA was enacted because "more than half of the children with disabilities in the United States do not receive appropriate educational services...." 20 U.S.C. § 1400(b)(3). To that end, the IDEA was enacted with the purpose of "assur[ing] that all children with disabilities have available to them...a free appropriate public education" and "that the rights of children with disabilities

and their parents or guardians are protected..." 20 U.S.C. § 1400(c). Accordingly, Congress devised a system of funding special educational and evaluative procedures, 20 U.S.C. § 1411, and required states and localities that accept such funding to both create and utilize an elaborate plan for providing special education, identifying children who need special educational assistance, and determining what assistance each needs. 20 U.S.C. § 1412-1414.

Most central to the IDEA is the enforcement system that is intended to enable the parents of children with disabilities to protect their children's rights and pursue, through the legal process, "the provision of a free appropriate public education." 20 U.S.C. § 1415(a). In enacting the IDEA, Congress was concerned that parents, who would be relied on as the main enforcement mechanism, be able to afford the cost of going through the process to secure a "free" and appropriate IEP for their child. First, Congress provided that the services outlined in the IEP must be provided to the parents at no charge. 20 U.S.C. § 1401(a)(18)(D), 34 C.F.R. § 104.33(c). In addition, to carry out the objective of helping parents afford the difficult process of challenging a school board's proposed IEP that does not comply with the IDEA, Congress provided for the recovery of attorney fees for a parent that substantially prevails under an action against the school board. 20 U.S.C. § 1415(i)(3)(B). These provisions highlight Congress' intent that an action under the IDEA be affordable enough to parents that legal costs would not prevent them from pursuing the rights of their disabled children.

The procedure for the federal district court review of an administrative hearing officer's decision in a due process hearing, outlined in 20 U.S.C. § 1415(i)(2)(B),

plays a crucial role in limiting the cost of an IDEA action for parents. Rather than allowing review to take the form of a full trial in federal district court, 20 U.S.C. § 1415(i)(2)(B) states that the district court judge shall base a review on the administrative record, supplemented by "additional evidence" the parties may present. While the IDEA permits a federal court to make an independent judgment as to the appropriateness of an administrative officer's decision, it must do so primarily based on the record and may not require a full, live re-trial of the case in federal court. Thus, a parent who has prevailed in a due process hearing should generally be able to afford to oppose an appeal to federal district court which would consist of the limited presentation of any "additional evidence" not already offered at the due process hearing. Similarly, an attorney considering representing a parent at a due process hearing can be assured of a reasonable likelihood of recovering fees after prevailing at the hearing, without having to incur the effort and expense of a second trial in federal court.

2. 20 U.S.C. § 1415(i)(2) is clear on the procedure for the review of an administrative hearing officer's decision in an IDEA due process hearing. Section 1415(i)(2)(B) provides that the procedure for review is limited to the administrative record plus "additional evidence." This provision plays a key role in constraining the costs that a parent who has prevailed at an IDEA due process hearing must bear in opposing an appeal of that decision in a federal district court. By limiting the court to hearing "additional evidence," this section gives meaning to the administrative due process hearing and prevents the federal review of such hearing from turning into a de novo

trial of the evidence already presented to the administrative hearing officer.

There has been some disagreement between the various federal circuits regarding the meaning of "additional evidence" in 20 U.S.C. § 1415(i)(2)(B)(ii). The majority of circuits, led by the First Circuit, have interpreted "additional, in the ordinary sense of the word, to mean supplemental." *Town of Burlington v. Department of Education for the Commonwealth of Massachusetts*, 736 F.2d 773, 790 (1st Cir. 1984); *Springer v. Fairfax County School Board*, 134 F.3d 659, 666-7 (4th Cir. 1998); *Ojai Unified School District v. Jackson*, 4 F.3d 1467, 1472-73 (9th Cir. 1993). These courts have held that any witness who testified at a due process hearing is presumptively foreclosed from testifying on appeal to federal court, which presumption may only be rebutted by strong justification for why additional testimony from the witness is necessary. *Town of Burlington*, 736 F.2d at 791; *Springer*, 134 F.3d at 667; *Ojai*, 4 F.3d at 1473. Even where a party does have "additional evidence" which is truly supplemental and not repetitive of the due process hearing testimony, these Circuits have generally also required a party to show a "solid justification" for supplementing the administrative record. *See Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 986 (1st Cir. 1990); *Ind. School District No. 283 v. S.D.*, 88 F.3d 556, 560 (8th Cir. 1996) ("*S.D. II*");*Gill v. Columbia 93 School District*, 217 F.3d 1027, 1037 (8th Cir. 2000).

On the other hand, the United States Court of Appeals for the Sixth Circuit has rejected the First Circuit's more limited interpretation of "additional," refusing to equate "additional" with "supplemental." *Metropolitan Govt. of Nashville v. Cook*, 915 F.2d 232, 234 (6th Cir.

1990). The Sixth Circuit has interpreted "additional" as meaning simply "something that is added, or something that exists by way of addition." *Id.* Under this slightly looser definition, a district court has more discretion to determine what evidence is "additional." *Id.*

Despite any such disagreement, the federal circuits have uniformly agreed that, in hearing "additional evidence," a federal district court "must be careful not to allow such evidence to change the character of the hearing from one of review to a trial *de novo*." *Cook*, 915 F.2d at 234-5 (quoting *Town of Burlington*, 736 F.2d at 791); *Ojai*, 4 F.3d at 1473; *Monticello Sch. Dist. No. 25 v. George L.*, 102 F.3d 895, 901 (7th Cir. 1996); *Brandon H. v. Kennewick Sch. Dist. No. 17*, 82 F.Supp.2d 1174, 1179 (E.D. Wa. 2000). If rehearing of evidence and testimony in federal court that was already presented at the due process hearing were allowed to occur, "the administrative process would be undermined and would render meaningless Congress' admonition that the Courts ascribe "due weight" to those underlying proceedings.") *See Ind. School District No. 283 v. S.D.*, 948 F.Supp. 860, 879 (D. Minn. 1995) ("*S.D. I*") (quoting *Roland M.*, 910 F.2d at 996).

At a minimum, the limitation of the federal review to the record plus "additional evidence" must be interpreted to bar the repetition of testimony and evidence already presented at the administrative hearing. In other words, "this clause does not authorize a witness at trial to repeat or embellish their prior administrative hearing testimony; this would be entirely inconsistent with the usual meaning of 'additional.'" *Town of Burlington*, 736 F.2d at 790 (also noting that avoiding repetition of due process hearing testimony "structurally assists in giving due weight to the administrative proceeding, as *Rowley* requires."); *S.D. I*,

948 F.Supp. at 879. Permitting a re-presentation of the evidence to the federal court would "reduce the proceedings before the state agency to a mere dress rehearsal by allowing appellants to transform the Act's judicial review mechanism into an unrestricted trial *de novo*." *Springer*, 134 F.3d at 667 (quoting *Roland M.*, 910 F.2d at 997).

Limiting the federal court to only hearing "additional evidence" helps control the cost to a parent of pursuing the IDEA action to completion by ensuring that the parent cannot be dragged through a second trial. This limitation also ensures that the due process hearing, one of the major procedural safeguards provided to parents in the IDEA, is not rendered meaningless by a full trial de novo on appeal to a federal district court.

3. Consistent with the proscription on conducting a full trial on review to a district court, the federal courts have interpreted 20 U.S.C. § 1415(i)(2)(B)(i) as mandating that the federal district court review and give some weight to the administrative record as the basis of the appeal. Indeed, this Court has held that the provision requiring the federal district court to "receive the records" "carries with it the implied requirement that due weight shall be given to these proceedings." *Board of Education v. Rowley*, 458 U.S. 176, 206 (1982).

Other federal courts have disagreed on the standard of how much weight or deference a district court must give to the findings of the administrative hearing officer. The First Circuit Court of Appeals has characterized the district court's review of the administrative decision as "an intermediate standard of review" which "falls well short of complete de novo review." *Lenn v. Portland School Committee*, 998 F.2d 1083, 1086 (1st Cir. 1993). The First

Circuit has even held that particular deference to the findings of the administrative officer are appropriate where the parents have prevailed at the due process hearing because the federal interest in displacing a state agency's ruling that one of its school systems has not provided an adequate IEP is minimized. *See Town of Burlington*, 736 F.2d at 792.

Similarly, the Sixth Circuit has described the standard of review of a due process hearing as a "modified de novo review," more deferential than the usual de novo review standard. *Doe v. Board of Education*, 9 F.3d 455, 458 (6th Cir. 1993). In requiring increased deference to the administrative decision, the Sixth Circuit has recognized that federal courts are "generalists with no experience in the educational needs of handicapped children." *Doe v. Smith*, 879 F.2d 1340 (6th Cir. 1989).

Also at the more deferential end of the spectrum, the Fourth Circuit has gone so far as to hold that the findings of an administrative hearing officer are "prima facie correct," requiring particular deference. *Doyle v. Arlington County Sch. Bd.*, 953 F.2d 100, 105 (4th Cir. 1991).

On the other hand, a number of circuits have characterized the standard of review as a typical "de novo review" under which the court must review the administrative record but is permitted to make an independent judgment as to the findings. *See Teague Independent School District v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993) ("virtually de novo"); *Lachman v. Illinois State Bd. Of Educ.*, 852 F.2d 290, 293 (7th Cir. 1988); *Gregory K. v. Longview School District*, 811 F.2d 1307, 1310-11 (9th Cir. 1987); *Gill*, 217 F.3d at 1037.

Regardless, all courts have uniformly recognized that the district court judge is required to actually review the entire record of the administrative due process hearing and base his decision on it, giving at least some weight to the hearing officer's findings. *See Wayne County Regional Educational Service Agency v. Pappas*, 56 F.Supp.2d 807, 811 (E.D. Mich. 1999) (IDEA "mandates" that the administrative record is "the basis of the appeal.") *Frazier v. Fairhaven School Committee*, 122 F.Supp.2d 104, 110 (D. Me. 2000) ("Congress made abundantly clear that courts should decide [IDEA] cases only after a serious and thorough examination of the records of the proceedings...") (quoting *Carey v. Maine School Administrative District #17*, 754 F. Supp. 906, 923 (D. Me. 1990); *S.D. I*, 948 F. Supp. at 879 ("the source of the evidence generally will be the administrative record"). The district court is certainly not permitted to largely ignore the administrative record, as the judge did in the present case. *See County of San Diego v. California Special Educ. Hearing Office*, 93 F.3d 1458, 1466 (9th Cir. 1996) ("courts are not permitted to simply ignore the administrative findings."); *Lenn*, 998 F.2d at 1087) ("judge is not at liberty either to turn a blind eye to administrative findings or to discard them without sounds reason."). Furthermore, if the district court does decide to reverse the decision of the administrative hearing officer, it must carefully consider and respond to the officer's resolution of each material issue. *Town of Burlington*, 736 F.2d at 792.

4. In the present case, the court clearly indicated to the parties that it would not accept the administrative record as the basis of the appeal, referring to the record as "fat" and "extraneous, irrelevant or unnecessary material," and insisting that the parties handle the appeal "as if this is

the trial." Accordingly, the parties were required to conduct a lengthy and costly trial *de novo* of the due process hearing, rendering such hearing virtually meaningless.

While the court did make sparse reference to the record in its decision, such reference was exclusively limited to the testimony of petitioner's expert who was not able to attend the district court trial to re-present her testimony. It is clear from the decision that the court ignored most of the record, relying almost exclusively on the live testimony presented in federal court (which, due to the prohibitive cost to petitioners of re-presenting their entire case, consisted of almost all witnesses for respondent). Moreover, the court's decision makes no effort to address or responded to almost all of the 97 detailed findings of fact and conclusions of law contained in the administrative officer's well-reasoned 49-page decision.

The Eleventh Circuit's approval of the procedure imposed by the district court and its ruling that the district court has the discretion to require live testimony rather than review of the record represents a dramatic departure from the standards outlined by Congress in the IDEA. The impact of this ruling is that any parent who wishes to pursue his child's rights under the IDEA may be facing the prospect of having to prepare for and conduct two complete trials in order to secure an appropriate IEP -- one trial in front of an administrative officer and one in federal court. Similarly, attorneys will be extremely reluctant to accept representation of parents in due process hearings if they have to invest the time and expense involved in two trials in order to obtain damages or attorneys fees. The procedure followed in this case and sanctioned by the

Eleventh Circuit, if allowed to stand, would make it simply impossible for the vast majority of parents and attorneys to enforce the IDEA's guarantee of a free appropriate public education for children with disabilities.

Given the already existing disagreement between federal court's on the proper standard of review of an IDEA due process hearing and on the definition of "additional evidence," this Court should take the sharp departure from IDEA's standards in this case as an opportunity to clarify that a district court judge must, at a minimum, review the entire administrative record, give some weight to the hearing officer's decision and address the officer's resolution of any material issues with which the court disagrees and that a federal court may not insist on repetition of live testimony that was already presented at the due process hearing.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 26, 2001

United States Court of Appeals,
Eleventh Circuit

William J. DEVINE, Terry Devine, et al., Plaintiffs-Counter-Defendants-Appellants,

v.

INDIAN RIVER COUNTY SCHOOL BOARD,
Defendant-Counter-Claimant-Appellee.

No. 99-13058.

May 2, 2001.

Parents of autistic child brought action against school board under Individuals with Disabilities Education Act (IDEA), challenging adequacy of child's individualized education program (IEP). The United States District Court for the Southern District of Florida, No. 93-14202-CIV-NCR, Norman C. Roettger, Jr., J., held for school board, and parents appealed, The Court of Appeals, Edmondson, Circuit Judge, held that IEP was adequate.

Affirmed.

West Headnotes

[1] Schools 155.5(4)
345k155.5(4)

Party attacking individualized education plan (IEP) bears burden of showing why IEP is not appropriate.

[2] Schools 155.5(3)
345k155.5(3)

Parents had to exhaust their administrative remedies by proceeding through due process hearings to adjudicate appropriateness of each of child's individualized education plans (IEPs) before they could challenge those IEPs in court. Individuals with Disabilities Education Act, § 615(f), as amended, 20 U.S.C.A. § 1415(f).

[3] Schools 155.5(2.1
345k155.5(2.1)

Parents lacked standing to assert claim under IDEA for school years occurring after they and their child were no longer residing in state. Individuals with Disabilities Education Act, § 612(a)(1)(A), as amended, 20 U.S.C.A. § 1412(a)(1)(A).

[4] Schools 154(3)
345k154(3)

Individualized education plan (IEP) was reasonably calculated to provide appropriate education for autistic child, even though it did not provide for residential placement or respite care for child's family; there was evidence that child had made progress in most education goals during prior school year, and no showing that respite care would benefit child's education. Individuals with Disabilities Education Act, § 612(a)(1)(A), as amended, 20 U.S.C.A. § 1412(a)(1)(A).

***1290** Arnaldo Velez, Coral Gables, FL, for Plaintiffs-Counter-Defendants-Appellants.

John William Bowen, Largo, FL, for Indian River County School Bd.

Before EDMONDSON, BLACK and McKAY [FN*], Circuit Judges.

FN* Honorable Monroe G. McKay, U.S. Circuit Judge for the Tenth Circuit, sitting by designation.

EDMONDSON, Circuit Judge:

This case is a challenge to an Individual Education Plan ("IEP") created pursuant to the Individuals with Disabilities Educational Act, 20 U.S.C. § 1400 *et seq.* ("IDEA"). We affirm the district court's decision upholding the IEP as being reasonably calculated to confer an appropriate education.

Plaintiffs William Devine, Terry Devine and John Devine filed this action against Defendant Indian River County School Board under the IDEA seeking a Free Appropriate Public Education ("FAPE").

John Devine is a child seriously impaired in all areas of functioning and has been classified as autistic. John and his family moved to the Indian River County School District in the fall of 1988. John enrolled in the Indian River School System and, after an assessment of his needs, was placed in a day program at the Wabasso School for Exceptional Children.

For the 1989/1990 school year, John attended Dodgertown Elementary School, ***1291** where an autistic program was created by the school board. John remained at Dodgertown for the 1990/1991 and 1991/1992 school years. IEPs were

developed and implemented for John by the school and with contribution from John's parents.

For the 1992/1993 school year, the school board and the parents could reach no agreement on an appropriate IEP. Mr. Devine insisted on residential placement, preferably at the May Institute. The school board did not believe residential placement was necessary for John to receive an appropriate education. The board, however, did offer the Devine family counseling and in-home behavioral counseling as it had done in the previous years. Mr. Devine rejected the school board's offer and requested a due process hearing.

While the hearing officer ruled that the 1992/1993 IEP was not appropriate and did not fail to provide John with an FAPE, the officer disagreed that John was entitled to residential placement.

Plaintiffs then filed, in the district court, a complaint seeking compensatory educational expenses (in the form of extended years of eligibility for services under the IDEA), attorney fees as the prevailing party in the due process proceeding, declaratory judgment approving residential placement of John at the May Institute and also reimbursement for the costs of John's placement at the May Institute.

The district court, after five days of live expert testimony and after reviewing the administrative record[1], concluded

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[1] Plaintiffs argue that the district court refused to consider the administrative record and to give due weight to the findings and conclusions of the hearing officer. It, however was within the district court's discretion to prefer live

that the 1992/1993 IEP provided John with an appropriate education and, accordingly, residential placement was not required. We affirm the district court's decision.

DISCUSSION

[1] First, we must decide who bears the burden of proving that an existing IEP is inappropriate in an IDEA challenge. Plaintiffs urge us to adopt the standard set forth by the New Jersey Supreme Court in *Lascari v. Board of Educ. of Ramapo*, 166 N.J. 30, 560 A.2d 1180 (1989). In *Lascari*, the New Jersey court concluded that the burden should be placed "on the school district not only when it seeks to change the IEP, but also when the parents seek the change." *Id.*, 560 A.2d at 1188. The court reasoned that school districts are uniquely situated in assessing the adequacy of an IEP because they possess a resource of experts who are quickly able to evaluate and determine the appropriate placement for a child. *See id.*

In contrast, Defendants ask us to adopt the standard employed by the Fifth Circuit, which determined that the party attacking the IEP should bear the burden of showing why the IEP is not appropriate. The Fifth Circuit wrote:

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testimony over that of depositions and, in the event live testimony was not possible, to require the depositions to be read into the record. Plaintiffs' assertion that the district court ignored the administrative record is belied by the court's final order, which extensively referred to the administrative record and specifically cited testimony given by Dr. Amy Weatherby, who did not testify before the district court.

> We have previously held -- as have the majority of federal courts that have considered the issue -- that [IDEA] "creates a presumption in favor of the education placement established by [a child's] IEP, and the party attacking its term should bear the burden of showing why the educational setting established by the IEP is not appropriate."

***1292** *Christopher M. v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1985 1290-91 (5th Cir. 1991)(internal citation omitted).

In addition to the Fifth Circuit, other federal courts have supported the view that the party attacking the IEP bears the burden of showing that the IEP is inappropriate. *See McKenzie v. Smith*, 771 F.2d 1527, 1531 (D.C. Cir. 1985); *Tatro v. State of Texas,* 703 F.2d 823, 830 (5th Cir. 1983), *rev'd in part on other grounds*, 468 U.S. 883, 104 S.Ct. 3371, 82 L.Ed.2d 664 (1984); *Burger v. Murray County Sch. Dist.*, 612 F.Supp. 434, 437 (N.D.Ga. 1984); *Bales v. Clarke*, 523 F.Supp. 1366, 1370 (E.D.Va. 1981). This placement of the burden is premised on the idea that, when a child is currently learning in a program that was jointly developed by the school district and the parents, the party attacking the program should show why it is inappropriate. *See Burger*, 612 F.Supp. at 437; *see also Lascari*, 560 A.2d at 1187.

We believe the Fifth Circuit holds the better view, especially in light of our circuit's previous recognition that great deference must be paid to the educators who develop the IEP. *See J.S.K. v. Hendry County Sch. Bd.*, 941 F.2d 1563, 1573 (11th Cir. 1991). In the present case, because it

is the parents who are seeking to attack a program they once deemed appropriate, the burden rests on the parents in this IEP challenge.

[2][3][4] The remaining issue in this case is whether the 1992/1993 IEP was reasonably calculated to confer the basic floor of educational benefits.[2]

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[2] Plaintiffs request damages and compensatory services for the years 1998 to 1993. Plaintiffs point to no record evidence which shows that Plaintiff ever requested a due process hearing on an IEP except that of 1992/1993. And Plaintiffs must exhaust their administrative remedies by proceeding through a due process hearing to adjudicate the appropriateness of the IEPs before they can challenge those IEPs in court. *See Babicz v. Sch. Bd. of Broward County*, 135 F.3d 1420, 1422 (11th Cir. 1998)(litigants must first exhaust administrative remedies under section 1415(f) of the IDEA before presenting federal claims regarding the denial of publicly financed special education).

On Plaintiffs' claims for 1993 to the present, Plaintiffs are entitled to no relief. The IDEA provides that "[a] free appropriate public education is available to all children with disabilities *residing in the State*." 20 U.S.C. § 1412(a)(1)(A)(emphasis added). Because Plaintiffs are no longer residing in the state of Florida and have, since 1993, been receiving residential placement from the state of Massachusetts at no cost to Plaintiffs, Plaintiffs have no standing to assert a claim under the IDEA after the 1992/1993 school year.

The Supreme Court has said that a student is only entitled to some educational benefit; the benefit need not be maximized to be adequate. *See Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 3046, 3049 n. 26, 73 L.Ed.2d 690 (1982). One of John's teachers, Ms. Brewer, testified that during the 1992/1993 school year, John made progress in 26 out of 27 education goals. The testimony of John's teachers also reflected that John was in large part uncontrollable when he first arrived at Dodgertown but that, over the school year, he reached a level where in acquired skills, which he could display across settings. John was also able to establish relationships with his peers and formed an especially close bond to one of his teachers, Ms. Thomas.

In contrast, the two experts on which Plaintiffs rely testified that John received no educational benefit during the ***1293** 1992/1993 school year. Both witnesses based their determination on limited observations of John and on the word of John's parents. The district court noted that neither witness consulted John's teachers nor requested documentation underlying the IEP. The district court also directly questioned the credibility of one of these experts and deemed his testimony to be suspect.

This same expert (who is affiliated with the May Institute), when evaluating whether John had received an appropriate education, defined an appropriate education as something "more than just making measurable and adequate gains in the classroom." But this circuit has specifically held that generalization across settings is not required to show an educational benefit. "If 'meaningful gains' across settings means more than making measurable and adequate gains in the classroom, they are not required by [IDEA] or *Rowley*." *J.S.K.*, 941 F.2d at 1573.

Plaintiffs also argue that the IEP was inadequate because it failed to provide respite care for the Devine family: that is, to provide for people -- other than the family -- to care for John at home. Dr. Russo, testifying to Plaintiffs, opined that respite care was "absolutely important" because the "parents often have other responsibilities. That is, their sole job cannot be to be the educator or teacher of a child who needs such education. They have other children. They have other responsibilities including jobs." While respite care will no doubt benefit the Devine family, Defendants fail to show how respite care will benefit John's education. In addition, Defendants provided testimony that the school did offer at-home services in the 1992/1993 IEP, which Plaintiffs rejected.

For these reasons, we conclude that Plaintiffs have failed to show that the 1992/1993 was not reasonably calculated to confer the basic floor of education benefits.

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

WILLIAM J. DEVINE, et al.

Plaintiffs, C.A. No. 93-14202-Roettger

v.

INDIAN RIVER COUNTY SCHOOL BOARD,

Defendant.

FINAL JUDGMENT

THIS CAUSE is before the Court for review of the final order issued by the hearing officer at the conclusion of the due process hearing held pursuant to 20 U.S.C. § 1415. In that hearing, plaintiffs challenged the individualized education program ("IEP") for the 1992-1993 school year developed by defendant Indian River County School Board ("school board") for plaintiff John Devine.[1]

The hearing officer concluded that the 1992-1993 IEP did not offer a free appropriate public education as required under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq.* ("IDEA") because it failed to coordinate protocols and methods used in school with those used at home; to provide transition services from school to post school activities; and to accommodate his entry into

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[1] Plaintiffs have sought to address issues outside the 1992-1993 IEP in their complaint. During trial, this court declined such an expansion as plaintiffs failed to request a due process hearing with respect to prior IEPs despite having been advised of their rights to do so. The court reaffirms this ruling and limits the discussion in this order to the issue of whether the 1992-1993 IEP provided John Devine with a free appropriate public education.

puberty. Plaintiffs bring this action seeking attorney's fees and costs as prevailing parties in the administrative proceeding; compensatory damages for expenses incurred as a result of the allegedly deficient IEP; extended eligibility under IDEA; and prospective relief ordering residential placement at the May Institute. The school board files a counterclaim seeking a determination that the 1992-1993 IEP did provide a free appropriate public education and that the findings of the hearing officer were contrary to the IDEA.

This court held a hearing from February 21, 1995 through and including February 24, 1995. The hearing was recessed as the parties were unable to conclude the presentations during the court's trial calendar. It was resumed and concluded on October 20 1998.[2] The parties were provided additional time to file supplemental briefs.

Upon consideration of the administrative record, the testimony presented during trial, the briefs filed by the parties and the record in this cause, the court reaches the following findings of fact and conclusions of law.

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[2] The lengthy delay in the resumption of the hearing results from several circumstances. When the court recessed on February 24, 1995, the parties were advised in open court that the matter would be reset in July 1995. This court sent written notice setting the case on the court's July 17, 1995 calendar. Trial did not resume on that date as plaintiffs took an interlocutory appeal of this court's order denying plaintiffs' motion for withdrawal of Robert F. Blackmore as counsel of record. After the Eleventh Circuit Court of Appeals affirmed this court's order by mandate issued on October 7, 1997, this matter was set for status in February 1998 and trial in August of 1998. Plaintiffs requested and received a continuance of the trial.

FINDINGS OF FACT

John Devine has been diagnosed with autism, a pervasive impairment of cognitive and perceptual functioning exhibited by a limited ability to understand, communicate, learn and participate in social relationships.[3] This condition will last throughout John Devine's life and he will always require some degree of adult supervision.

John Devine and his family moved to the Indian River County School System and, after an assessment of his needs, was placed in the Wabasso School for Exceptional Children during 1989/1990 school year. This was a day program, not a residential placement as has been the continual request of his parents, plaintiffs William and Terry Devine.

For the 198/1990 school year, an autistic program was created by the school board at Dodgertown Elementary School. Margaret Thomas was hired as teacher for the program and John was the only student for this particular year. Mike Ferrentino was a behavior specialist available for consultation. At the beginning of the school year, John was unmanageable. He did not follow instruction and was unable to remain seated for any substantial period of time. He would run away or throw tantrums in order to avoid the tasks being required by his teacher. As the year progressed, John showed improvement. He would remain seated and follow instruction from his teacher.

In May 1990, a presentation regarding the autistic program was made to the school board. The children made statements to the board that at first John was not responsive

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[3] It is undisputed by the parties that John is a child with a disability entitled under the IDEA to a free, appropriate public education by the school board.

to them and would run away. However, as the year progressed, he began to interact with them. One boy recounted how John would say to him "Goodbye, see you tomorrow." Terry Devine also appeared at this meeting. She expressed her joy over the positive change she had seen in her son during his time at Dodgertown. She noted her son's great eagerness to go to school everyday to be, as he put it, with his friends.

For the 1990/1991 and 1991/1992 school years, John remained at Dodgertown. IEPs were developed with input from his parents and implemented. Margaret Thomas remained as his teacher. Not only did she supervise him at school, he spent some weekends with her, went to restaurants and church, and occasionally slept at her home. In her testimony, she traced John's progression from a child who was uncontrollable to one who sat still, stayed on task and learned various skills displaying them across settings. One example was putting away silverware which was accomplished at the group home, her house and her daughter's house. Another skill was setting the table at the group home, her house and her daughter's house.

For the 1992/1993 school year, the school board and the parents could not reach agreement on an appropriate IEP. Mr. Devine provided the school board with a proposed IEP developed in conjunction with the May Institute. The school board incorporated the portions of the proposed IEP which it thought appropriate. However, it did not believe a residential placement was required. At this point, Mr. and Mrs. Devine were insistent on such a placement preferably at the May Institute. The school board offered family counseling and in-home behavioral counseling as it had done in previous years. Specific details of the services were not set forth. In his deposition, Mr. Devine stated that he would not accept

home training from Mike Ferrentino, behavior specialist for the school board, as he was not competent.

By 1992, the autistic program at Dodgertown had grown requiring two classrooms. Therefore, although Ms. Thomas was across the hall and still interacted with John, Donna Brewer was his teacher for the 1992/1993 school year working with John in school, at the group home, and in the community. Ms. Brewer testified that John continued to develop his skills during the school year. She noted the following progress in the categories listed on the 1992/1993 IEP: no progress in one, moderate progress in eight, significant progress in nine and seven goals met.

At the administrative hearing and at the hearing before this court, the testimony of several experts was presented. Unsurprisingly, those offered by the plaintiffs, principally Dr. Dennis Russo and Dr. Amy Weatherby, found that the 1992/1993 IEP failed to provide John with a free appropriate public education while those presented by defendant, Dr. Gary Edwards and Stephen Calculator, advanced the opposing view.

According to plaintiff's experts, nothing that was provided for John Devine during the 1992/1993 school year was of value. Both reach this conclusion on limited observation of John and without consulting his teachers or requesting the documentation underlying the IEP. Both reject any successes noted on the IEP as the teachers were incompetent. This repudiation of the progress noted by the teachers who spent entire school years with John was based on their limited observations and the word of John's parents whose desire since their arrival in Indian River County by their own admission was for a residential placement.

The experts primarily take issue with the educational methods chosen by the school board. Their overarching concern is the lack of coordination of program

between the school setting and the home resulting in a failure to generalize skills over various settings. Yet, they give no weight to the school's offer to establish a program for the home and the parents refusal to accept this offer.

The court did not have the opportunity to observe Ms. Weatherby. However, certain observations regarding Dr. Russo's testimony are in order. His testimony was replete with defensive and evasive answers to questions detracting considerably from his credibility. Also, the genuineness of Dr. Russo's testimony that a residential placement is necessary is suspect concerning that the May Institute, of which he is the vice president, charges plaintiffs over $90,000 to provide these very services. Plaintiffs would no doubt be very unhappy should Dr. Russo testify that coordination between home and school could achieve the same benefit. Tellingly, Ms. Weatherby testified during the administrative proceedings that a residential placement might only be a temporary situation with eventual placement back home with the proper coordination.

The experts presented by the school board naturally are of the opinion that John Devine did receive an educational benefit. While noting the need to coordinate school and home, they nevertheless note John's progress with respect to focus, ability to stay on task and to perform these tasks in various settings. They do not categorically dismiss the efforts of Ms. Thomas or Ms. Brewer. Mr. Calculator correctly cites the paradox created by the hearing officer's order. Although the parents were unwillingly to accept the school board's attempts to provide services in the home, the hearing officer nevertheless faults the school board for failing to implement such a program. The court also notes that one expert, Dr. Gary Edwards, has been involved with John since 1988. Therefore, he is in unique position to evaluate John's advancement.

Relying heavily on the testimony of plaintiffs' experts on the needs of autistic children generally and giving little weight to the school board's offer of assistance in the home, the hearing officer found that the 1992/1993 IEP did not provide a free appropriate public education as it failed to coordinate protocols and methods used in school at home; to provide transition services from school to post school activities; and to accommodate his entry into puberty. However, the hearing officer found that a residential placement was not necessary as an appropriate coordinated program between the home and the school may be established.

CONCLUSIONS OF LAW

Under the IDEA, the school board must provide John Devine with a free appropriate public education. Services provided must be tailored to serve the individual needs of the child through the development of an IEP. To determine the appropriateness of an IEP, the court must decide: 1) whether the school board complied with the procedures set forth in the IDEA and 2) whether the IEP developed through this procedure was reasonably calculated to enable the child to receive educational benefits. *Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176, 206 (1982); *Weiss v. School Board of Hillsborough County*, 141 F.3d 990, 994 (11th Circuit 1998); and *J.S.K. v. Hendry County School Board*, 941 F.2d 1563, 1572 (11th Circuit 1991).

The parties in this action dispute the second point.[4] To determine if a handicapped child has received

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[4] To the extent that plaintiffs contend that the IEP fails to comport with requirements of 20 U.S.C. § 1401(a)(20), the

educational benefits under an IEP, the court must determine whether he has received the basic floor of opportunity. *Weiss* at 997 and *J.S.K.* at 1572-1573. The IEP and the IEP's educational outcome need not produce maximum educational gain for the child. *Weiss* at 997. If the educational benefits are adequate based on surrounding and supporting facts, the Act's requirements have been satisfied. *J.S.K.* at 1573. The determination is made on a case by case basis and the administrative determination, although a matter to be weighed, is not binding. *Rowley* at 206. However, great deference should be given to the educators who develop the IEP as it is not the role of the court to overturn the state's choice of appropriate educational theories. *Id.* at 207-208. Further, although an integral part of the process in developing an IEP, parents may not dictate that a school board provide a specific educational program. *Weiss* at 997 and *Tucker v. Calloway County Board of Education*, 136 F.2d 495, 506 (6th Circuit 1998).

The rigidity with which plaintiffs' experts hold their respective positions that John obtained no benefit is belied by the record evidence Ms. Thomas and Ms. Brewer are extremely caring teachers who used their best efforts to implement the IEP developed by the school board. The record reflects that John Devine was in large part uncontrollable when he first arrived at Dodgertown and reached a level where he acquired skills such as appropriate table manners which he could display across settings. He also established relationships with his peers and an especially close bond to Ms. Thomas. This court has no reason to disbelieve the teachers or disregard their

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evidence presented at the administrative level and the subsequent hearing fails to support this position.

observations. The educational benefits provided John Devine were adequate and therefore the 1992/1993 IEP was appropriate under the IDEA.

As for the prime concern of the hearing officer and plaintiffs' experts that any gains during school time were not being reinforced after hours, it is not a failure the school board should carry. The school board was extremely accommodating to the Devines. This is evidenced by its establishment of a program at Dodgertown when it became apparent that the Wabasso school would be inappropriate and by its willingness to incorporate goals from the proposed 1992/1993 IEP submitted by William Devine. Although not specifying details, the offer was made to the parents to provide a home program. Had the parents availed themselves of this opportunity, a stronger program may have been formed. The efforts of the school board were thwarted by the parents. In seeking what they believe best for their child, as any parent would, the Devines sought to dictate a specific educational program requiring a residential placement. However, a parent's efforts to obtain a perceived maximum educational opportunity for their child is not covered by the IDEA. Therefore, it is

ORDERED AND ADJUDGED that judgment is hereby entered in favor of defendant Indian River County School Board and against plaintiffs William Devine, Terry Devine and John Devine. Defendant shall go hence without day. Costs to be taxed against plaintiff. The Clerk of the Court is directed to close this case file and all remaining motions are DENIED as moot.

DONE AND ORDERED this 30th day of July, 1999.

Signed: Norman C. Roettger
United States District Court Judge

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOHN DEVINE

Petitioner,

v. Case No. 92-5664E

INDIAN RIVER COUNTY
SCHOOL BOARD,

Respondent.

FINAL ORDER

Pursuant to notice, a formal hearing was conducted in this case on April 12-14, 1993, in Vero Beach, Florida, and on April 15, 1993, in Tallahassee, Florida, before J. Stephen Menton, a duly designated Hearing Officer of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: William J. Devine o/b/o John Devine
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Robert F. Blackmore, Esquire
(on proposed final order only)
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For Respondent: John W. Bowen, Esquire
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Fort Lauderdale, Florida 33308

STATEMENT OF THE ISSUE

The issue in this case is whether the Indian River County School Board's proposed placement of John Devine in a program for autistic students at Dodgertown Elementary School constitutes a free appropriate public education within the meaning of the federal Individuals with Disabilities Education Act. (IDEA), 20 U.S.C. 1401, *et seq.*, the implementing regulations and corresponding state law and regulations.

PRELIMINARY STATEMENT

At a meeting with representatives of the Indian River County School Board (the "School Board") on September 16, 1992, William Devine, the natural father of John Devine ("John" or the "Student"), requested a due process hearing on an Individualized Educational Program (IEP) for the Student proposed by the School Board on September 9, 1992. By letter dated September 17, 1992, counsel for the School Board forwarded the matter to the Division of Administrative Hearings for appointment of a Hearing Officer to conduct a formal hearing pursuant to Sections 230.23(4) and 120.57(1), Florida Statutes.

As set forth in an Order entered in this cause on November 17, 1992, the parties requested that this case be held in abeyance pending discussions between the parties regarding possible alternative placements for the Student. By letter dated February 16, 1993, William Devine advised that settlement discussions were terminated and a due process hearing was necessary. Mr. Devine also requested that this case be consolidated with a separate administrative proceeding which he had requested from the Department of Health and Rehabilitative Services. As explained in Orders entered in this case on February 26, 1993, and April 2,

1993, Mr. Devine's request to consolidate was denied after several telephone conferences hearings on the issue.

With the concurrence of the parties, the hearing in this matter was scheduled for the week of April 12, 1993, in Vero Beach. Thus, the parties waived the requirement in Rule 6A-6.3311(5)(j), Florida Administrative Code, that the hearing be held and Final Order entered within forty-five days. Prior to the commencement of the hearing, Mr. Devine requested that a portion of the hearing be held in Tallahassee because several witnesses resided there. During a telephone conference hearing held prior to the final hearing, this request was granted over Respondent's objection. The hearing was conducted as scheduled in Vero Beach, Florida on April 12, 13 and 14, 1993. The hearing was concluded on April 15, 1993, in Tallahassee.

Although the parties disputed who had the burden of proof in this proceeding, it was agreed at the outset of the hearing that the School Board would first present evidence regarding the educational program it had developed for John. The School Board contends that John has been offered an appropriate educational program which addresses his needs. At the hearing, the School Board was afforded a full opportunity to present evidence to support its position. Likewise, Petitioner was afforded a full opportunity to present evidence in support of the contention that the program is not appropriate under the applicable statutes and regulations. Ruling on the issue of the burden of proof was reserved pending written submittals fro the parties. That issue is addressed in the Conclusions of Law below.

The School Board presented the testimony of six witnesses during the hearing in Vero Beach: Donna Olson, Executive Director of Student Support Services and the former Director of Exceptional Student Education for the School Board; Dr. Gary Edwards, a licensed clinical

psychologist; Margaret Thomas, a teacher of autistic students for the School Board and John's teacher from 1989 through 1992; Donna Brewer, a teacher in the autistic program at Dodgertown Elementary School and John's teacher during the 1992/1993 school year; Michael Ferrentino, an exceptional student education coordinator for the School Board; and Dr. James Kemp, a speech and language pathologist who is employed as the administrative coordinator for rehabilitative services at Miami Children's Hospital.

The School Board offered forty-three exhibits into evidence. All of the exhibits except Respondent's Exhibits 18, 41, 42 and 43 were provided to the Student's father at least five days prior to the hearing and were accepted into evidence without objection. Respondent's Exhibit 18 was a videotape of John and members of his family at a presentation before the School Board. Petitioner's relevancy objection to the admission of the tape was overruled. Respondent's Exhibit 41 was a videotape of John in the classroom at various times since he began school in Indian River County, Florida in 1988. Petitioner objected to this exhibit on the grounds of relevancy and on the grounds that the School Board had not advised John's parents that John was gong to be videotaped in the classroom and the tape could be used against them at a due process hearing. These objections were overruled. Respondent's Exhibit 42 was a composite of the four backup tapes from which Exhibit 41 was made. Respondent's Exhibit 41 has been reviewed and considered in the preparation of this Final Order. As explained at the hearing, the backup tapes (Respondent's Exhibit 42) were accepted for purposes of completing the record, however, neither party requested that the backup tapes be reviewed and considered. Consequently they have not been reviewed. Petitioner was granted the right to supplement

the record in this case after reviewing the backup tapes. No such supplemental evidence has been provided. Respondent's Exhibit 43 was a resume of Dr. Kemp. After initially objecting to this exhibit, Petitioner's objection was withdrawn and Respondent's Exhibit 43 was accepted.

While in Vero Beach, Petitioner presented testimony from three witnesses: Dr. Gary Norris, the executive director of the School Board; Dr. Dennis Russo, a licensed psychologist in the Commonwealth of Massachusetts who is employed as a vice-president for health and rehabilitative services at the May Institute in Massachusetts; and Stephen Stoltz, program supervisor for developmental services for the State of Florida Department of Health and Rehabilitative Services ("HRS"). Respondent objected to Dr. Russo's testimony on the grounds that he was not available for deposition prior to the hearing. Respondent's objection as overruled and Dr. Russo was allowed to testify. Respondent' was granted the opportunity to conduct Dr. Russo's cross-examination by late-filed deposition and/or to supplement the record after the hearing was adjourned to address issues raised by him. Respondent waived those options.

In accordance with the ruling made prior to the commencement of the hearing, the site of the hearing was moved to Tallahassee on the morning of April 15, 1993. At the April 15 hearing, Petitioner presented the testimony of Dr. Amy Weatherby, a speech and language pathologist who is employed by the Department of Communications at Florida State University. Petitioner had subpoenaed several other witnesses to testify, but decided not to call them. Over Petitioner's objection, Respondent was permitted to call two of those witnesses: Mitchell Wagner and Marcia Beach, both of whom are employed by the Florida Advocacy Center. In addition, Respondent was permitted to recall Donna Olson.

Prior to the hearing, Petitioner had 110 exhibits pre-marked. During the hearing, Petitioner offered pre-marked Exhibits 1, 6-13, 15, 18, 24, 29, 34-37, 39-43, 45, 46, 48, 50, 56, 58, 61, 62, 81, 86, 88, 90, 91, 95, 99, 100, 102, 105-107, and 110. Petitioner had an additional exhibit marked at the hearing as Petitioner's Exhibit 111. Respondent's relevancy objections to Petitioner's Exhibits 8, 10,15, 41, 45, 48, 50, 81, 86, and 95 were overruled. Respondent also objected to Petitioner's Exhibits 40, 43, and 45 on the grounds that they related to settlement negotiations. These objections were also overruled. All of the above enumerated exhibits offered by Petitioner were accepted into evidence. By letter dated April 18, 1993 and filed with the Division of Administrative Hearings on April 20, 1993, William Devine submitted a copy of John's most recent class picture and asked that it be admitted as an exhibit. Mr. Devine's letter represented that counsel for Respondent did not object to this request and no written objection has been received. Accordingly, the picture is hereby accepted as Petitioner's Exhibit 112. As explained at the hearing, many of Petitioner's Exhibits contained hearsay which has been considered in accordance with Section 120.58(1)(a), Florida Statutes.

A full transcript of the hearing has been filed. The School Board and Petitioner, through his attorney (who was not present at the hearing), timely filed Proposed Findings of Fact and separate legal memoranda on June 17, 1993. A ruling on each of the proposed findings of fact in those submittals is included in the Appendix to this Final Order. William Devine submitted a separate written closing argument on June 13, 1993, which has also been reviewed and considered. On July 16, 1993, Respondent submitted a Notice of Supplemental Authority. Petitioner submitted a Notice of Supplemental Authority on July 22, 1993. The

supplemental authorities provided by both parties have been reviewed and considered.

FINDINGS OF FACT

Based on the evidence adduced at the hearing and the entire record in this proceeding, the following findings of fact are made:

1. The Indian River County School Board (the "School Board") is the agency responsible for providing public primary and secondary education in Indian River County, Florida (the "School District"). The School Board received federal financial assistance under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C., Section 1400 *et seq.*, and is a local educational agency under that Act. The School Board is responsible for providing a free, appropriate public education to disabled students in accordance with the IDEA.

2. John Devine, who turned 14 on May 10, 1993, moved to the School District from Massachusetts with his parents in the fall of 1988.

3. John's medical and school records reflect that he was identified a presenting severe developmental problems beginning at 9 months of age. Since that time, he has undergone numerous exhaustive diagnostic processes undertaken in an effort to ascertain the nature of his problems and to assist in developing effective interventions for him. John's diagnosis at the time of enrollment in the School District was a pervasive developmental disorder, a seizure disorder which was precipitated by breath holding, and moderate mental retardation. There is no dispute that John is a child with a disability entitled to the protections of and the services available under IDEA. He is severely impaired in all areas of functioning, particularly daily living skills and socialization. As discussed below, John

has been classified by the School Board as autistic for purposes of Rule 6A-6.03023, Florida Administrative Code.

4. Rule 6A-6.03023, Florida Administrative Code define an autistic student as

> One who has a disability reflective in severe disorders of communication, behavior, socialization, and academic skills, and whose disability was evidence in the early developmental stages of childhood. The autistic child appears to suffer primarily from a pervasive impairment of cognitive and perceptual functioning, the consequences of which are manifested by limited ability to understand, communicate, learn, and participate in social relationships.

5. Autism is considered to be a lifelong developmental disability.

6. Prior to moving to Florida, John was enrolled in an exceptional student education program for autistic youngsters in Massachusetts where he was under one-to-one supervision. In preparation for their move to Florida, John's father contacted the School Board in May 1988 regarding the educational program that would be provided for his son. Arrangements were made for John's father to visit the Wabasso School for Exceptional Children which the School Board suggested as a possible placement for John. Arrangements were also made for the transfer of John's records from the Massachusetts School System to the Indian River School Board. Based upon a review of those records and further discussions with the parents, John was placed by the School Board in the program for trainable mentally handicapped students at Wabasso School beginning in October 1988. All parties understood that this placement was made for diagnostic purposes.

7. John's father suggests that the School Board was lax in developing an appropriate program for John during the 1988/1989 school year and did not provide John or the family with all of the services to which they were entitled. As explained during the hearing, the appropriateness of John's placement prior to the 1992/1993 school year is beyond the scope of this proceeding. The parties were, however, permitted to present evidence regarding the programs and services offered to John in the past. Based upon the evidence presented, it appears that, from the time John enrolled in the School District, the School Board has worked in good faith with his parents to provide an appropriate placement and has timely provided the parents with notice of their due process rights. While the parties obviously disagree as to the School Board's obligations under IDEA, both parties have strived to do what is best for John given their respective perceptions of IDEA's requirements.

8. From the initiation of their discussions with the Indian River School System, John's parents have suggested the need for a residential placement for John. The School Board officials advised the parents that, since John was not coming from a residential placement, they wanted to try to accommodate him in the existing school programs. The School Board also explained that it needed an opportunity to learn about John and his special needs.

9. In response to the parents' request for a residential placement, several School Board officials investigated the possibility of placing John at the Deveareux Program for Autistic Children. After visiting the program, the School Board officials did not feel it was appropriate for John and John's parents concurred.

10. At the time of his enrollment in the Indian River School District, John's pervasive developmental disorder was marked by severe language and learning

delays, aberrant behaviors and autistic-like behaviors. Among John's significant behavioral problems at the time were hand-flapping, tantruming and breath-holding. When John got agitated or frustrated, he would sometimes kick endangering himself, property and potentially other people. It was very difficult to get John to stay on task for any activity for more than a matter of seconds without running away. The only time John would stay on task for any extended period was when he was working on jigsaw puzzles. He was able to complete a 500 piece jigsaw puzzle very quickly.

11. John's breath-holding had been the target of several previous behavior interventions in Massachusetts. John's parents were attempting to deal with the breath-holding behavior by requiring John to wear a thick belt (similar to a weight lifting belt) around his thorax which put pressure against his diaphragm and served to minimize breath-holding. Without the belt, John would frequently engage in breath-holding, often in response to frustration or stress, which would often result in seizures. When he first came to Florida, John was having seizures many times daily. He wore a helmet to prevent head injuries in the event he fell during a seizure.

12 Once John began school at Wabasso, his teacher and other School Board officials had an opportunity to observe him firsthand and evaluate his academic achievement and behavior. The School Board also undertook some testing.

13. Shortly after h[illegible]egan at Wabasso, the School Board obtained permissio[illegible]rom John's parents to conduct a psychological examination to determine John's eligibility for special educational services and to assist in the development of an appropriate educational plan for him. On October 22, 1988, Dr. Gary Edwards, a clinical child psychologist, conducted a psychological evaluation of

John. The results of the evaluation were consistent with the previous impressions of John in the records from Massachusetts and confirmed that he was "severely functionally impaired . . . with a pervasive developmental disorder consistent with an impression of autism."

14. Dr. Edward's observations of John revealed that John had poor communication skills, that he was easily frustrated, and that his breath-holding was frequently in response to stress or frustration. John's speech was quite pressured and he was notably echolalic and perservative. Dr. Edwards deemed John's breath holding to be extremely disruptive and a critical factor that had to be considered in developing any programs for him.

15. Dr. Edwards attempted to administer a Stanford Binet intelligent test and a visual perceptual motor test. The two tests were intended to determine John's cognitive functioning, but John was unable to complete the tests.

16. Dr. Edwards' evaluation of John included an interview with John's father. Based upon the information provided by John's father, Dr. Edwards completed the Vineland Scale of Independent and Adaptive Behavior for John. John was found to be functioning well below average with respect to communication (29 on a 100 scale), daily living skills (20), and socialization (33). He was given a composite score of 21 on the Adaptive Behavior Scale.

17. The evidence did not establish any deficiencies in the administration of the tests. After a one-month diagnostic period, the School Board classified John as autistic and a decision was made to keep him at Wabasso for the remainder of the school year. An IEP for this placement was prepared and approved by John's father. At this time, John was the only child identified as autistic in the School District.

18. At Wabasso, John was assigned a full-time aide. The School Board also hired Dr. Edwards as a consultant. He visited the school frequently and helped develop a behavior management program which consisted of contingency management where John's access to reinforcers such as food or puzzles was dependent upon his making a desired response. The goal of the behavior management program developed by Dr. Edwards was to get John to stay in his seat and remain on task. John's parents were consulted in the development of the behavior management program, but it does not appear that any written program was presented to the parents. Furthermore, there was no specific coordination of the behavior management program in the school with a program in the home.

19. It is not clear what happened to John during the summer of 1989. Prior to the beginning of the 1989/90 school year, both John's parents and the School Board agreed that a placement other than Wabasso was necessary for John. The School Board decided to create an autistic program at Dodgertown Elementary School which was one of the District's regular education elementary schools.

20. On September 14, 1989, an IEP meeting was held regarding the proposed placement of John at Dodgertown. After John's mother agreed in principle with the proposed placement, the School Board hired a teacher, Margaret Thomas, for the program. Ms. Thomas has a Master of Science degree in Special Education with emphasis on severally emotionally disturbed, learning disabilities and behavioral disorders. John was the only student assigned to the autistic classroom for the 1989/90 school year. Mike Ferrentino, a behavior specialist, was available for consultations on a daily basis.

21. The proposed IEP developed as a result of the September 14, 1989 meeting recommended that a

"home/school program" be implemented to provide parent training. In addition, during the process of finalizing that IEP, the School Board offered to include family counseling in the IEP if the parents so desired. The School Board claims that it offered family counseling because it recognized that John's condition had placed the family under great stress. Family counseling was one way the School Board felt it could help alleviate that stress.

22. The School Board contends that John's parents chose not to avail themselves of the "home/school" or family counseling programs. However, it does not appear that the School Board ever clearly explained to the parents what was contemplated with respect to these services. In any event, no specific home/school program was ever approved or implemented and no counseling was provided. No conclusion is reached in this Final Order as to whether such services should have been included in the prior IEP's. However, as discussed in more detail below, the evidence did establish that a proper IEP for 1992/93 should include a specific delineation of efforts to coordinate the behavior modification and instructional programs between the home and school.

23. On October 27, 1989, an IEP meeting was held to finalize the IEP for the 1989/90 school year. During that meeting, John's father again raised the issue of a residential placement for John and specifically mentioned the Higashi School in Massachusetts. The parents ultimately agreed to the October 17, 1989 IEP which did not include family counseling or the "home/school program."

24. The October 1989 IEP included a recommendation for a summer school program, but did not include respite care services for John's parents or extended-day educational services. Indeed, up through the date of the hearing in this case, the School Board has not formally provided any extended-day or respite services to John's

parents. Notwithstanding the lack of any formal extended-day services or weekend educational services, the evidence established that, throughout the time John was enrolled in Mrs. Thomas' class, she would frequently take him out shopping, to her home, etc. John's parents concede that Mrs. Thomas was an extremely caring and giving person whose efforts on behalf of John were extraordinary.

25. Prior to John enrolling at Dodgertown, the principal of the school talked to the students in the fourth and fifth grade classes about autism and about John. She also met with the parent advisory committee to explain the autism program. As a result of this ground work, John's transition to Dodgertown was greatly facilitated. Efforts to mainstream John for physical education and lunch were largely successful.

26. During the first four months John was enrolled at Dodgertown, his behavior was very agitated and he was extremely non-compliant. He would scream and attempt to run to avoid doing what was requested of him. As reflected in the videotapes from this period, John was very easily frustrated and was unable to remain in his seat for more than a matter of seconds. Over time, his behavior at school improved and he was able to remain on task for longer periods of time.

27. On November 27, 1989, an IEP meeting was held to review John's progress. During this meeting, the School Board agreed to confer with caregivers hired by John's family to assist in his care at home. These caregivers were to be instructed regarding the behavior management strategy utilized at school so that a consistent program could be established and followed at home. It is not clear whether any such instruction was requested or provided.

28. At the end of the 1989/90 school year, the School Board agreed to provide a six-week summer

program for John. This program was reflected in an IEP dated May 31, 1990, which was approved by John's parents.

29. John remained enrolled at Dodgertown for the 1990/91 school year. Mrs. Thomas continued to be his teacher. At some point during this period, one additional student was enrolled in the class and Donna Brewer was employed as a teacher assistant for the class. There were no significant changes to the program or services offered to John during that school year.

30. John remained enrolled in the autistic program at Dodgertown during the 1991/92 school year without any significant changes in the program or the services provided by the School Board.

31. Sometime during the 1991/92 school year, John's father requested the School Board to review the possibility of sending John to Threshold, a residential program outside of Orlando. Several School Board officials, including Mrs. Thomas, accompanied Mr. Devine to investigate that program. All of the people on the trip agreed that Threshold would not be an appropriate place for John.

32. In response to the many suggestions by John's father that a residential placement was necessary for John, the School Board's position was that John had multiple needs and that John's family had needs as well. In trying to determine its responsibilities, the School Board tried to sort out all of these needs and determine what John's "educational" needs were as opposed to his social, family or medical needs. The School Board felt that John was progressing in the program at Dodgertown and that his "educational" needs could be addressed without a residential placement. The School Board also felt that John did not need extended day, weekend services or respite care in order to benefit from the program. As discussed in more

detail below, the evidence established that a true evaluation of John's "educational" needs requires a more comprehensive evaluation of John's behavior at home and how it relates to his conduct at school. While the aberrant behaviors of an autistic child may be reduced in one environment such as a school, they can concurrently increase in another environment such as the home. This "contrast effect" requires the coordination of educational protocols between the home and the school. Such coordination can occur by extending the educational services to the home which would necessarily require parent training in the protocols. Absent such efforts, an autistic child is likely to lose or fail to generalize any gains made in the educational setting.

33. The School Board worked with the parents in trying to persuade the Florida Department of Health and Rehabilitative Services ("HRS") to provide an appropriate residential placement for John. John was evaluated by HRS which developed habilitation plans for him dated December 7, 1989, December 3, 1990, and December 2, 1991. Through the 1989 and 1990 habilitation plans, John's parents were provided with respite care services. After the first year, HRS had to cut the amount of respite care it provided to John's parents because of a funding decrease. The 1991 habilitation plan recommended a residential placement in a group home for John. This recommendation for a residential placement was based upon an overall evaluation of the needs of both John and his family. Unfortunately, HRS did not have sufficient funding to provide the residential placement recommended in the habilitation plan. In fact, HRS currently has a waiting list of approximately 180 people who are in need of a long-term residential care facility but cannot be placed in one of the 53 group homes in the District. John's father requested an administrative hearing regarding the failure of

HRS to provide a residential placement for his son and requested that the case involving HRS be consolidated with this case. After several telephone conference hearings on the issue, the request to consolidate was denied for the reasons set forth in Orders entered in this cause on February 26, 1993 and April 2, 1993.

34. In March of 1992, the School Board arranged for a consultant from the Florida Autism Program at the University of South Florida to visit Dodgertown and review the autistic class. The report that issued as a result of that review recommended a few changes in the program, but was basically favorable about the approach being used. The consultant's report recommended a heavier emphasis on community based instruction and also provided some recommendations for curriculum materials and methods for reinforcing desired behaviors.

35. Dr. Edwards conducted a triennial reevaluation of John as required under IDEA on March 16, 1992. In order to prepare his report, Dr. Edwards observed John in the classroom and in the home. Dr. Edwards' report indicates that John was still experiencing seizures precipitated by breath-holding. The report also notes that John's parents indicated that, as John has gotten older, he has become more difficult to manage at home. The parents relayed that they could no longer control his agitated behavior. Dr. Edwards recognized that the stress caused by John's presence in the home has significantly impacted on the family.

36. Dr. Edwards evaluated John using the Vineland Adaptive Behavior scales which were completed based upon information obtained from John's parents and teachers. John's adaptive behavior scores in 1992 were not significantly different than the scores obtained in 1988. Dr. Edwards testified that, since the test is aged normed, John was demonstrating a higher level of functioning in 1992

than he was in 1988. In other words, in order to obtain the same score in 1992, as he did in 1988, John had to show some gains.

37. Dr. Edwards' report noted a marked improvement in John's behavior in class and his ability to stay on task in the classroom. He still became agitated at times, but he was much more manageable. Dr. Edwards felt that John had made significant gains since 1988 and that his progress was not simply a matter of getting older. Dr. Edwards concluded that John was benefiting from the educational program provided by the School Board. In reaching this conclusion, Dr. Edwards did not address John's behavior outside the classroom and/or his parents' complaints that they could no longer manage him.

38. On April 26, 1992, an IEP meeting was held to review Dr. Edwards' report, evaluate John's progress in school and discuss the goals for the coming year. During this meeting, John's parents asserted that, contrary to the descriptions of John's behavior in class, his behavior at home had not improved. In addition, they were upset that he was not learning any transferable functional living skills. John's parents stated that John needed to be in a 24-hour residential placement. At the conclusion of the meeting, it was agreed that the School Board would prepare an IEP for a summer program for John and a decision on John's placement in the fall would be postponed.

39. The School Board agreed to provide a summer program for John from June 11 through July 17, 1992. In addition, the School Board coordinated with the Indian River County Recreational Department, the Association of Retarded Citizens and HRS to continue with a respite program which was to run from July 20 through August 14, 1992. That program terminated one week early because of scheduling problems with the teachers who were involved.

An IEP was prepared for the School Board's portion of this summer program. John's parents agreed to the IEP.

40. During the summer of 1992, the School Board sent Mrs. Thomas and Donna Brewer, the teacher's aide in the autistic class during the 1991/92 school year who was to assume full-time teaching responsibilities during the 1992/93 school year, to a two-week course at Florida State University for training regarding the teaching of autistic children. It does not appear that either teacher had much formal training in teaching autistic children prior to this class.

41. In August of 1992, the School Board attempted to schedule a meeting to develop John's IEP for the 1992/93 school year. Prior to that meeting, John's father provided the School Board with a proposed IEP that was developed in corroboration with the May Institute in Massachusetts. According to John's father, that proposed IEP emphasized the functional skills that John would need for the remainder of his life. He requested that the proposed IEP be utilized in developing John's program.

42. An interim IEP was prepared by the School Board and sent to John's parents on August 18, 1992. On August 20, 1992, John's father wrote to the School Board objecting to the proposed temporary IEP. John's father requested that a meeting regarding the IEP be scheduled in September. The School Board agreed and continued with the directives of the IEP from the previous year until the meeting could be scheduled.

43. On September 16, 1992, John's parents met with the School Board's personnel to develop an IEP for the 1992/93 school year. At that meeting the School Board presented a draft IEP which incorporated many of the items set forth in the proposed IEP provided by John's father in August. John's parents would not agree to the proposed IEP because it did not provide for an extended day program

or a 24-hour placement. They indicated their desire for a due process hearing if those services would not be provided. They left the meeting before the IEP was finalized.

44. The School Board officials who were present at the September 16 meeting continued to work on the draft IEP which was finalized and later typed up. A copy of the proposed IEP for the 1992/93 school year (the "Challenged IEP") was sent to John's parents on September 22, 1992.

45. The Challenged IEP references a Behavior Management Plan, but that Plan was not included with the materials sent to John's parents. In fact, the School Board never provided the parents with a written Behavior Management Plan until shortly before the hearing in this case. The Challenged IEP includes family counseling and in-home behavioral counseling to assist John's parents in coping with John's management. The specific details of these programs were not spelled out.

46. The Challenged IEP proposed the continued placement of John in the autistic program at Dodgertown for a regular six hour school day. By the end of the 1992/92 school year, the autistic program at Dodgertown had grown to nine students. The School Board decided to divide the program into two classes for the 1992/93 school year. The Challenged IEP calls for John to be placed in a class with three other autistic students.

47. Donna Brewer, who was the teacher's assistant for the autistic class for the prior two years, was assigned to teach the class in which John was placed. Mrs. Brewer is a dedicated, caring teacher who has developed a good relationship with John. She has not been certified to teach children with learning disabilities, but she does have a temporary certification.

48. The teacher's assistant for John's 1992/1993 class was a custodian at Dodgertown from approximately

1983-1988. Around 1989 he became a teacher's aide. He has assisted with the autistic students since that time. He has no formal training in special education and he does not participate in the instruction of the students or the curriculum planning. While he provides a useful role in helping to manage the students, the evidence established that Mrs. Brewer needs assistance from another teacher, at least on a part-time basis, to effectively handle four students in one autistic class.

49. The Challenged IEP includes a number of goals which address the functional living skills that are essential to an appropriate IEP for John. Some of these skills will be taught within the context of a community based instructional program. Under this program, the students go to a group home one day per week to practice daily living skills such as household chores, cleaning and laundry. The students are also taken out into the community to practice crossing streets, going to restaurants and to stores.

50. At the time of Dr. Edwards' evaluation in March of 1992, John was described as being approximately five foot, seven inches tall and weighing 150 pounds. John has grown significantly since then. The three other autistic students in John's 1992/93 classroom are much smaller. The Challenged IEP does not adequately consider John's size and age in determining his placement. Dodgertown is an elementary school where all of the students are significantly younger and smaller than John. John has entered puberty and has experienced the growth of body hair, increased body odor and other typical biological changes encountered during puberty. His physical needs are significantly different than those of the other students. While John's placement at Dodgertown was helpful in the past and enabled some mainstreaming for lunch and physical education, his size and age make continued

placement at Dodgertown less useful. An appropriate IEP should address these issues.

51. John's family believes that John needs to be placed in a residential program. Specifically, the family would like to have John placed at the May Institute in Massachusetts. The evidence was insufficient to establish that a residential placement was essential in order to provide John with an appropriate free public education.

52. The May Institute in Massachusetts provides a variety of services for profoundly handicapped children and their families. The May Institute has a great deal of experience and expertise in dealing with autistic children. In addition to educational programs, the May Institute offers training services for parents and families. among the programs offered are transitional group homes which are intended to be an alternative to institutional settings for identifying and managing difficult behaviors. The evidence established that a residential placement at the May Institute would provide the maximum possible educational benefit for John.[1] However, it cannot be concluded based upon the evidence in this case that a residential placement at the May Institute would be the only placement where John could receive an appropriate public education.

53. The cost for a residential placement at the May Institute is in excess of $92,000 per year. The evidence did not establish the amount of money spent by the School Board per student in the autism program at Dodgertown Elementary School.

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[1] The evidence did not reveal any program in the state of Florida which is comparable in quality to the May Institute in terms of staffing, services, training or programs for families with autistic children.

54. While the evidence did not establish that the School Board is obligated to provide a residential placement for John, the evidence did establish that the Challenged IEP is not reasonably calculated to provide John with educational benefits. In addition to the problems already noted, the Challenged IEP does not fully address the severity and nature of John's disability.

55. While there is much about autism that is not known, certain characteristics are widely recognized. Autistic children like rituals, organization and maintenance of the status quo. They are often perceptually impaired and can have a difficult time dealing with multiple stimuli. Autistic children do not learn well in groups and require more intensive educational methodology. John, like many autistic children, demonstrates an intense insistence on sameness and has great difficulty transitioning to new people and places. John gets extremely stressed when changing environments, including going to and leaving school. These characteristics necessarily impact on his "educational needs" and must be addressed in the IEP.

56. The Challenged IEP is inadequate because it does not include an adequate assessment of John's functioning and behavior at home. As discussed in more detail below, consistency in behavior modification and educational protocols across environments is necessary for autistic children. Like many autistic children, John is severely lacking in daily living skills. He cannot dress himself, clean himself or go to the bathroom without constant adult supervision and prompting. He also fails to recognized danger to himself. For an autistic child such as John, close supervision will almost certainly be necessary for the rest of his life. Semi-independent living in an adult or foster home is probably the best that can be expected for John. An appropriate IEP for John must take into account his condition, his limitations and his potential.

57. Petitioner's experts, Dr. Russo and Dr. Weatherby, were very knowledgeable and persuasive regarding the characteristics and needs of autistic children. Unfortunately, neither witness demonstrated a thorough knowledge of the program offered by the School Board for John. Dr. Russo had never been to Dodgetown and apparently had never spoken with any of the School Board officials involved in the program. Dr. Weatherby spent one day with John in the home and at school. However, she did not discuss the program in depth with any of the School Board employees and she did not demonstrate a thorough understanding of the School Board's program. Nonetheless, the testimony of both witnesses is given great weight with respect to the educational needs of autistic children.

58. Children with autism have great difficulty generalizing what they learn to different environments. Thus, an autistic child will often be unable to demonstrate a "learned" skills in a new or different setting. Unless an educational program extends its services to the home and the family, the likelihood of any long term value resulting from the program is minimal. An appropriate IEP for an autistic child should address this well-recognized characteristic of autism. The IEP should specify the different settings in which the child will be expected to master particular goals.

59. The School Board's willingness in the past to provide training to the caretakers retained by John's family is a step in the right direction. In addition, the inclusion in the Challenged IEP of "behavioral consultation for behavior plan at home" is a necessary start. However, the behavioral plan which is part of the 1992/1993 IEP only addresses John's behavior at school. In view of the nature of John's condition, an appropriate IEP must include a

comprehensive behavioral plan which addresses his behavior in school and at home.

60. The School Board has sent representatives to John's home on occasion to observe his behavior. However, the School Board has not attempted to determine whether any of the skills John has learned at school have transferred to the home. An appropriate IEP for John requires a comprehensive evaluation of his performance at home and to the extent to which he can transfer skills to a different environment. In addition, an appropriate IEP should more specifically delineate the steps that will be taken to coordinate the behavioral program at home and at school. In this regard. the IEP should recognize the characteristics of John's disability, especially the difficulty he has in generalizing and transferring learning, and should specifically outline how the School Board proposes to address John's needs. Unless the IEP considers the underlying and pervasive characteristics of John's disability, the education plan is no more than a superficial attempt to deal with behavioral manifestations of his condition in a particular setting.

61. An autistic child can be "prompted" in specific environments with a particular cue. Thus, prompts are very helpful in teaching autistic children. However, they can become addictive to the child. Prompted performance is an important intermediate step, but it should not be the ultimate goal of the educational program. Use of prompts for an autistic child can result in a phenomenon known as "hooking on the prompt." In other words, the child learns the prompt, not what you are trying to teach. An appropriate IEP should recognize the tendency for John to become prompt-dependent and should describe goals and methods which build independent skills.

62. The School Board points to the improvements in John's behavior in the classroom, especially those during

the 1992/1993 school year, as proof that John has benefited from the School Board's program. This focus is too narrow and is not appropriate in view of John's disability.

63. There are three phases to the education of autistic children. The first phase is acquisition, i.e. induction of a behavioral change; the second phase is generalization of the behavioral change; and the third is maintenance of the change. The first phase involves identifying an effective program which develops a skill or reduces a negative behavior or in some way improves performance. For an autistic child, the behavioral change will not continue unless there is an explicit program for generalization and maintenance of the change. Moreover, learned changes for autistic children are often person specific, situation specific and environment specific. Thus, an appropriate IEP for an autistic child should recognize this characteristic and develop strategies to teach the desired behavior in a variety of environments, including the home environment. In other words, generalization and maintenance targets should be built into the IEP. Such programs should be explicit and well defined.

64. The evidence established that several of the skills which John was deemed to have mastered on his prior IEP's have not been transferred out of the classroom setting.

65. John has not had a seizure since January 20, 1993. The reason for the decline in seizures is not known and it is impossible to predict if or when they will return. Some experts believe that hormonal and other changes during puberty have a calming influence on autistic children. It is not clear whether the cessation of seizures and/or the behavior changes noted in the school are the result of the behavior modification and educational programs at the school or simply the result of John's biological changes.

66. Without question, John's condition has placed his family under enormous stress. John has a brother who is three years younger and sister who is seven years younger. The presence of these siblings certainly affects the ability of John's parents to cope with his behavior, especially as he gets older and larger. As discussed above, if John is to remain at home, an appropriate IEP should include a specific program to ensure continuity between the programs at school and at home. Any such program should take into account the existing family situation and include respite or other services as necessary.

67. After John's parents requested a due process hearing in September of 1992, the School Board officials continued discussions with the parents regarding possible alternative placements for John. The School Board officials worked with the parents and other state and local agencies in an attempt to establish a therapeutic group home in which John could be placed. John's parents contend that a settlement agreement was reached pursuant to which John was to be placed at the May Institute pending completion of the group home in Vero Beach. Both parties were allowed to present evidence regarding this issue. The evidence established that no conclusive agreement was reached.

68. John's parents are very concerned parents and strong advocates for their child. While the parents did not avail themselves of the references by the School Board to a "home/school program," the importance and specifics of such a program were never explained to them. After the parents requested a due process hearing, some difficulties were encountered in arranging for John's parents to enter the classroom. The evidence surrounding these problems was inconclusive. Unfortunately, the problems in arranging access for John's parents to Dodgertown caused or contributed to the development of an antagonistic and/or

adversarial attitude between John's parents and the School Board. It cannot be concluded that this antagonism precludes the development of an effective IEP which includes a home/school program.

CONCLUSIONS OF LAW

69. The Division of Administrative Hearings has jurisdiction over the subject matter of and parties to this proceeding. Section 120.57(1) and 230.23(4)(m), Florida Statutes, (1991) and Rule 6A-6.03311(5)(d), Florida Administrative Code.

70. John is entitled under federal and state law to a free, appropriate public education.

71. The Individuals with Disabilities Education Act ("IDEA") (formerly the Education for the Handicapped Act) 20 U.S.C. Section 1401 *et seq.* was enacted:

> . . . to assure that all children with disabilities have available to them, within the time periods specified in [20 U.S.C. 1412(2)(b)], a free appropriate public education which emphasizes special education and related services designed to meet their unique needs. to assure that the rights of children with disabilities an their parents or guardians are protected, to assist the States and localities to provide for the education of all children with disabilities and to assess and assure the effectiveness of efforts to educate children with disabilities

20 U.S.C. Section 1400(c)

72. The IDEA provides federal money to assist state and local agencies in furnishing educational services to children with disabilities. Although the Act supplies financial assistance to those states that comply with its provisions, the Act also imposes certain duties and obligations on the states and local agencies receiving the funds. The most important responsibility on the states receiving funds is to effect a "policy that assures all handicapped children the right to a free appropriate public education."

73. The IDEA defines a "free appropriate public education" at 20 U.S.C. 1401(a)(18), as:

> . . . special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program [IEP] program required . . . [by 20 U.S.C. 1414(a)(5)].

74. "Special education" is defined by the Act at 20 U.S.C. 1401(a)(16) as:

> . . . specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability, including (A) instruction conducted in the classroom, in the <u>home</u>, in hospitals and in <u>other settings</u> . . . (emphasis supplied).

75. "Related services" are defined at 20 U.S.C. 1401(a)(17) as:

> . . . transportation, and such other developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreational, including therapeutic recreation and social work services, and medical counseling services, including rehabilitation counseling, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education . . .

76. The Act's requirement for a free appropriate public education has been interpreted by the United States Supreme Court to be satisfied when the school system provides the child with a "basic floor of opportunity . . . consist[ing] of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." The instruction and services "must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and most comport with the child's IEP." *Hendrick Hudson Board of Education v. Rowley*, 458 U.S. 186, 201-203, 102 S.Ct. 3034, 3048-9, 73 L.Ed.2d 690 (1982).

77. The primary intent of the IDEA is to identify and evaluate children with disabilities and to provide them with access to the type of free public education that would be "sufficient to confer some educational benefit upon the

handicapped child." 458 U.S. at 200, 102 S.Ct. at 3048. Congress intended to provide access to public education, "but not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful." 458 U.S. at 192, 102 S.Ct. 15 3043. The Court rejected the notion that the school districts had to maximize the potential of each handicapped child. ". . . whatever Congress meant by an 'appropriate' education, it is clear that it did not mean a potential-maximizing education." 458 U.S. at 197 n. 21; 102 S.Ct. at 3046.

78. While the School Board is not obligated to provide the maximum educational benefits possible for each disabled child, it is required to develop a personalized program for the child taking into account his disabilities and his potential..

> Instead of saddling public agencies and tax payers with the enormous expenditures necessary to maintain the handicapped as lifelong dependent in a minimally acceptable institutionalized existence, Congress reasoned that the early injection of federal money and provisions of educational services would remove this burden by creating productive citizens.

Kruelle v. New Castle County School District, 643 F.2d 687, 691 (3d Cir. 1981).

79. The education that is offered must take into consideration the child's level of functioning:

> In light of Congress' purposes to secure personal independence and to enhance productivity, when necessary, an appropriate

> education must provide training in rudimentary social and personal skills. "Where basic self-help and social skills such as toilet training, dressing, feeding and communication are lacking, formal education begins at that point."

VanderMalle v. Ambach, 667 F.Supp. 1015, 1038 (S.D.N.Y. 1987) quoting *Battle v. Commonwealth of Pennsylvania*, 629 F.2d 269 (3d Cir. 1980).

80. The IDEA requires that all handicapped children be given a full opportunity for an appropriate education through the process of developing and implementing an IEP. 20 U.S.C. Section 1401(18). In evaluating exceptional students and drafting an IEP, a School Board must draw information from a variety of sources and placement decisions must be made by a multi-disciplinary team including persons knowledgeable about a student, the meaning of the evaluation data, and the placement options. 34 C.F.R. 104.35(c); Rule 6A-6.0331(2) and (3)(c), Florida Administrative Code. A meeting must be held at least once a year to review each exceptional student's individual educational program. Rule 6A-6.0331(3)(c)1, Florida Administrative Code. In assessing the IEP, the *Rowley* court limited the task to determining if the IEP is "reasonably calculated to enable the child to receive educational benefits." 458 U.S. at 207, 102. S.Ct. at 3051.

81. Section 230.23(4)(m), Florida Statutes (1991) was adopted, in part, to meet the requirements of the federal IDEA. The Florida law requires the School Board to provide an "appropriate program of special instruction, facilities and services for exceptional students." Subsection 230.23(4)(m), Florida Statutes, further requires that:

1. The School Board provide the necessary professional services for diagnosis and evaluation of exceptional students.

2. The School Board provide the special instruction, classes and services, either within the district school systems in cooperation with other district systems, or through contractual arrangements with approved non public schools or community facilities, which meet standards established by the state board.

82. The Rules of the Florida Department of Education governing special programs are found at Chapter 6A-6, Florida Administrative Code. Rule 6A-6.0301(1) defines an "exceptional student" as:

> . . . any child or youth enrolled in or eligible for enrollment in the public schools of a district who requires special instruction or related services to take full advantage of or respond to educational programs and opportunities because of a physical, mental, emotional, social or learning exceptionality as defined in Rules 6A-6.03011 through 6A-6.03025 [of the Florida Administrative Code].

83. There is no dispute that John is an exceptional student for purposes of the Florida Statutes and rules implementing the IDEA.

84. Rule 6A-6.03311, Florida Administrative Code, sets forth procedural safeguards regarding the placement of exceptional students. The child's parents or guardian must

be given an opportunity to participate in the IEP process and, if they refuse to participate or feel that the IEP developed by the school system is inappropriate, an impartial hearing can be requested by the parents or the school system. *Hendry County School Board v. Kujawski*, 498 So.2d 566 (Fla. 2d DCA 1986).

85. Neither the IDEA nor the state statute specify which party in a due process hearing has the burden of proof. After reviewing the various legal authorities cited by the parties, it is concluded that Petitioner bears the burden of proving in this proceeding that the proposed educational program offered by the School Board does not provide a free appropriate public education as required under IDEA, the implementing regulations and corresponding state law. *See, Swift v. Rapides Parish Public School System*, 812 F.Supp. 666 (W.D. La. 1993); *Dept. of Transportation v. J.W.C. Company, Inc.*, 396 So.2d 778, 789 (Fla. 1st DCA 1981). However, the results reached in this Final Order would not be different if the burden of proof was placed upon Respondent.

86. Subsection 230.23(4)(c), Florida Statutes (1991), requires that each school district in Florida provide:

> . . . adequate educational facilities . . . through the uniform system of schools for all children of school age in the district, these facilities to be provided with due regard to the needs of the children on the one hand and to economy on the other.

87. Section 230.23(6)(m), Florida Statutes, requires the superintendent, principals and teachers to utilize the regular school facilities and adapt them to the needs of exceptional students whenever possible. This requirement is consistent with the policies of the IDEA and the

regulations promulgated thereunder which require children with disabilities to educated with non-handicapped children "to the maximum extent possible." 20. U.S.C. Section 1412(5). While Congress recognized that it would not always be possible, students should be mainstreamed to the extent they can and an appropriate educational program must be offered in the least restrictive environment possible.

88. While there is little question that John would benefit greatly from placement at a residential program such as the May Institute, it cannot be concluded that such a placement is required under IDEA. As noted above, the U.S. Supreme Court made it clear in *Rowley* that a school board is not required to maximize the potential of each handicapped child. 458 U.S. at 198, 102 S.Ct. at 3046. Residential placements, by their very nature, are difficult to reconcile with the statutory goals of mainstreaming and educating children in the least restrictive environment. In this case, the evidence indicates that an appropriate educational program may be possible if a coordinated program between the home and school is established and the specific characteristics of John's disability are taken into account.

89. It should be noted that Florida courts have limited hearing officers from the Division of Administrative Hearings to determining the appropriateness of an IEP. *See, Hendry County School Board v. Kujawski*, 498 So.2d 566 (Fla. 2nd DCA 1986). Arguably, a particular alternative placement can be recommended if the School Board's proposed program is inappropriate. However, the undersigned does not have the authority to order a placement at the May Institute or any other particular program as a result of this proceeding. *Id.* at 568.

90. While the evidence did not establish the need for a residential placement, it did establish that the

Challenged IEP was not adequate under IDEA and the corresponding state law and regulations for the reasons noted in the Findings of Fact above.

91. Trying to discern a school board's obligations from the myriad decisions since *Rowley* is often confusing and difficult. In some instances, courts have upheld determinations that a student's medical and other needs were so intertwined with the educational needs as to be inseparable. *See, McKenzie v. Smith*, 771 F.2d 1527, 1534 (D.C. Cir. 1985); *Abrahamson v. Hershman*, 701 F.2d 223 (1st Cir. 1983); *Parks v. Pavkovic*, 753 F.2d 1397, 1404-1405 (7th Cir. 1985); *Ash v. Lake Oswego School District*, 980 F.2d 585 (9th Cir. 1992); *Drew P. v. Clarke County School District*, 877 F.2d 927 (11th Cir. 1989); *Papacodea v. State of Connecticut*, 528 F.Supp. 68, 72 (D. Ct. 1981) and *VanderMalle v. Ambach*, 667 F.Supp. 1015, 1039 (S.D.N.Y. 1987). The School Board argues that these cases are not pertinent to this proceeding and that the Eleventh Circuit decision in *J.S.K. v. Hendry County School Board*, 941 F.2d 1563 (11th Cir. 1991), which involves an autistic child in Florida, is more analogous and supports its position that John has been offered an appropriate public education. As the court in *J.S.K.* noted, each case must be decided on its own facts.

> J.S.K.'s parents, the Board and the District Court have tried to analogize J.S.K.'s situation to other plaintiff handicapped children. We find the comparisons unhelpful. To be of value, a court's analysis must focus on the facts of the case before it when examining an IEP. That one child in another case might be more speculation and of little help in determining whether a

personalized IEP has provided adequate educational benefit.

941 F.2d at 1563 n. 4.

92. Even if it is assumed that the School Board's program at Dodgertown has resulted in some behavioral improvements for John, his size and entry into puberty preclude the mere continuation of that program from providing him with an appropriate education. Moreover, the evidence indicates that improvement in his behavior at school may be at the expense of his behavior at home. Such a "contrast effect" is not unusual with autistic children. A child whose behavior at school improves at the expense of his behavior at home is not receiving an appropriate education. *See Gladys J. v. Pearland Independent School District*, 520 F.Supp. 869, 878 (S.D. Tex. 1981). Given the nature of John's disability his parents' complaints that his behavior at home was deteriorating should not have been dismissed simply as "family needs" as opposed to "educational needs." *See VanderMalle v. Ambach*, *supra* 667 F.Supp. at 1039. Unless there is a deliberate and planned coordination between efforts undertaken during the school day and the protocols and methods utilized in the home after school, the efforts to "educate" John will be wasted.

93. A proper evaluation of this case must take into account certain amendments to the statute which have taken effect subsequent to most of the decisions cited above. IDEA was previously known as the Education of the Handicapped Act. Congress changed the name of the statute in Public Law 101-476 (the "Amendments") effective October 30, 1990. Those Amendments specifically included "autism" as a recognized disability in the federal statute for the first time. In addition, Section

101(b) of Public Law 101-476 amended the definition of "special education" in 20 U.S.C. 1401(a)(16) to include "instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings . . . ." The Amendments also recognized the need to prepare children with disabilities for the real world and directed the inclusion of transition plans in IEP's.

94. Transition services were defined as

> . . . a coordinated set of activities for a student designed within an outcome-oriented process, which promotes movement from school to post-school activities, including post-secondary education, vocational training, integrated employment (including supported employment) continuing and adult education, adult services, independent living, or community participation. The coordinated set of activities shall be based upon the individual student's needs taking into account the student's preferences and interests, and shall include instruction, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation.

95. A statement of the needed transition services must be included in an IEP for a student beginning no later than age sixteen. The 1990 amendments specifically recognized that transition services should begin at age fourteen or younger when appropriate. The evidence established that, because of the severity and permanency of John's disability, an appropriate IEP must focus on the

skills that he will need to survive in the future. It is not sufficient to wait until age sixteen to begin to develop transition plans for John. The School Board should focus on these issues immediately.

96. Respondent points to the improvements in John's behavior in the classroom as proof that its educational program is working. The evidence established that John's educational needs can not be so easily segregated. Without exception, the School Board employees who testified at the hearing are very dedicated, caring people. Notwithstanding their admirable efforts, an appropriate IEP for John must recognize and address the nature and characteristics of his disability.

97. Petitioner has requested an award of damages, compensatory services, and attorney's fees. Such awards are beyond the scope of this proceeding. *See, Hendry County School Board v. Kujaski, supra*, 498 So.2d at 568.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED

The School Board's 1992/1993 IEP for John Devine does not offer a free appropriate public education as required by IDEA, the implementing regulations and corresponding State law and regulations. The School Board should revise the IEP and offer to John's family the services necessary to address the deficiencies noted in this Final Order.

DONE AND ORDERED in Tallahassee, Leon County, Florida this 21st day of September 1993.

Signed: J. Stephen Minton

J. STEPHEN MINTON
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

APPENDIX

Case No. 92-5664

Both parties have submitted Proposed Findings of Fact. The following constitutes my rulings on the proposed findings of fact submitted by the parties.

Petitioner's Proposed Findings of Fact

1. Adopted in substance in Findings of Fact 1 and 45 except that John's date of birth was May 10, 1979, not 1977.
2. The first sentence is adopted in substance in Findings of Fact 47. No competent substantial evidence was presented to support the remainder of this proposal.
3. Adopted in substance in Findings of Fact 2.
4. Subordinate to Findings of Fact 2, 3 and 6. The specifics of the program offered for John in Massachusetts were not established in this case.
5. Adopted in substance in Findings of Fact 3.
6. The first sentence is adopted in substance in Findings of Fact 3. The second sentence is rejected as unnecessary and not established by competent substantial evidence. The evidence indicates that at various times John has taken medications in an attempt to control his seizures. It was not clear whether John was taking any such medication at the time of the hearing.
7. Adopted in substance in Findings of Fact 3.
8. Subordinate to Findings of Fact 10. Because of John's size and unpredictable behavior, he can present some risk to the safety of others. However, the evidence did not establish that he was deliberately aggressive to other people and/or that

he should be considered a threat to the safety of others.

9. Rejected as overly broad. This subject matter is addressed in Findings of Fact 10 and 38.
10. Rejected as vague and overly broad. This subject matter is addressed in Findings of Fact 38.
11. Subordinate to Findings of Fact 56 and 60.
12. Adopted in substance in Findings of Fact 38.
13. Rejected ad overly broad. This subject matter is addressed in Findings of Fact 64.
14. Adopted in substance of Findings of Fact 11 and 65.
15. Adopted in substance of Findings of Fact 60 and 64.
16. Adopted in substance in Findings of Fact 56.
17. Subordinate to Findings of Fact 37 and 38.
18. Rejected as speculative. The subject matter is addressed in part in Findings of Fact 35.
19. Rejected as not established by competent, substantial evidence and subordinate to Findings of Fact 52.
20. Adopted in substance in Findings of Fact 66.
21. Adopted in substance of Findings of Fact 35, 38 and 66.
22. Rejected as overly broad and unnecessary. As noted in Findings of Fact 22 and 68, no meaningful effort has been undertaken to establish a training program for the parents.
23. Rejected as overly broad and unnecessary. The evidence did establish that John needs constant supervision and that his parents have hired caregivers to assist them.
24. Adopted in substance in Findings of Fact 22, 24, 32, 59 and 60.
25. Rejected as overly broad and unnecessary.
26. Rejected as vague and unnecessary.
27. Adopted in substance in Findings of Fact 63.

28-31 Adopted in substance in Findings of Fact 63.
32. Rejected as vague and unnecessary.
33. Rejected as overly broad and unnecessary.
34. Adopted in substance in Findings of Fact 32, 56 and 58.
35. Adopted in substance in Findings of Fact 32, 56 and 58.
36. Adopted in substance in Findings of Fact 61.
37. Adopted in substance in Findings of Fact 65.
38. Adopted in substance in Findings of Fact 65.
39. Adopted in substance in Findings of Fact 65.
40. Adopted in substance in Findings of Fact 55.
41. Rejected as unnecessary.
42. Subordinate to Findings of Fact 32, 56 and 58.
43. Subordinate to Findings of Fact 8, 38 and 42.
44. Adopted in substance in Findings of Fact 18, 22, 45 and 59.
45. Adopted in substance in Findings of Fact 18, 22, 45 and 59.
46. Subordinate to Findings of Fact 18, 22, 27, 29,30, 32, 43, 45, 59 and 66.
47. Subordinate to Findings of Fact 324, 28, 30, 31, 32, 39 and 66.
48. subordinate to Findings of Fact 34, 28, 30, 31, 32 , 39 and 66.
49. Subordinate to Findings of Fact 24, 28, 30, 31, 32, 39 and 66.
50. Subordinate to Findings of Fact 24, 28, 30, 31, 32, 39 and 66.
51. Subordinate to Findings of Fact 56, 60, 62 and 64.
52. Subordinate to Findings of Fact 28, 31, 32, 39, 60 and 66.
53. Adopted in substance in Footnote 1.
54. Adopted in substance in Findings of Fact 31.
55. Subordinate to Findings of Fact 51 and 52.

56. Rejected as contrary to the weight of the evidence and subordinate to Findings of Fact 67.
57. Rejected as unnecessary and not established by competent substantial evidence.
58. Rejected as contrary to the weight of the evidence and subordinate to Findings of Fact 19.
59. Rejected as contrary to the weight of the evidence and subordinate to Findings of Fact 7, 19 and 56.

Respondent's Proposed Findings of Fact

1. Adopted in substance in Findings of Fact 1.
2. Adopted in substance in Findings of Fact 3.
3. Adopted in substance in Findings of Fact 2 and 3.
4. Adopted in substance in Findings of Fact 6.
5. Adopted in substance in Findings of Fact 6 and 13.
6. Adopted in substance in Findings of Fact 13.
7. Adopted in substance in Findings of Fact 13.
8. Adopted in substance in Findings of Fact 10 and 14.
9. Adopted in substance in Findings of Fact 11.
10. Adopted in substance in Findings of Fact 6, 17 and 18.
11. Adopted in substance in Findings of Fact 8.,
12. Adopted in substance in Findings of Fact 9.
13. Adopted in substance in Findings of Fact 17.
14. Adopted in substance in Findings of Fact 10.
15. Adopted in substance in Findings of Fact 18.
16. Adopted in substance in Findings of Fact 19.
17. Adopted in substance in Findings of Fact 19 and 20.
18. Subordinate to Findings of Fact 21 and 22.
19. Subordinate to Findings of Fact 21 and 22.
20. Adopted in substance in Findings of Fact 20.
21. Adopted in substance in Findings of Fact 25.
22. Adopted in substance in Findings of Fact 23.
23. Adopted in substance in Findings of Fact 7.

24. Rejected as unnecessary. The issue of the admissibility of the video tapes was resolved during telephone conference hearings prior to the commencement of the final hearing.
25. Adopted in substance in Findings of Fact 26.
26. Subordinate to Findings of Fact 24.
27. Adopted in Findings of Fact 34.
28. Adopted in substance in Findings of Fact 35.
29. Adopted in substance in Findings of Fact 35.
30. Adopted in substance in Findings of Fact 35.
31. Adopted in substance in Findings of Fact 37.
32. Adopted in substance in Findings of Fact 35.
33. Adopted in substance in Findings of Fact 36.
34. Adopted in substance in Findings of Fact 37.
35. Adopted in substance in Findings of Fact 38.
36. Adopted in substance in Findings of Fact 39.
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38. Adopted in substance in Findings of Fact 39.
39. Adopted in substance in Findings of Fact 41.
40. Adopted in substance in Findings of Fact 41.
41. Adopted in substance in Findings of Fact 42.
42. Adopted in substance in Findings of Fact 42.
43. Adopted in substance in Findings of Fact 42.
44. Adopted in substance in Findings of Fact 43.
45. Rejected as unnecessary.
46. Adopted in substance in Findings of Fact 43.
47. Adopted in substance in Findings of Fact 43.
48 Adopted in substance in Findings of Fact 43 and 44.
49. Adopted in substance in Findings of Fact 44.
50. Subordinate to Findings of Fact 45, 46 and 49.
51. Subordinate to Findings of Fact 45.
52. Subordinate to Findings of Fact 51, 5, 56 and 62.
53-54 Subordinate to Findings of Fact 54-65.
55. Subordinate to Findings of Fact 32, 55, 58 and 61-65.

56. Subordinate to Findings of Fact 32, 55, 58 and 61-65.
57. Subordinate to Findings of Fact 32, 55, 58 and 61-65.
58. Subordinate to Findings of Fact 55-58 and 61-65.
59. Subordinate to Findings of Fact 55-58 and 61-65.
60. Rejected as unnecessary and subordinate to Findings of Fact 26 and 65.
61. Subordinate to Findings of Fact 52-65.
62. subordinate to Findings of Fact 62-65.
63. Addressed in the Preliminary Statement.
64-77 Rejected as a summary of testimony rather than Findings of Fact. This subject matter is addressed in Findings of Fact 55-65.
78. Adopted in substance in Findings of Fact 33 except that only the 1991 habilitation plan addressed the need for residential placement.
79. Subordinate to Findings of Fact 33.
80. The first sentence adopted in substance in Findings of Fact 33. The second sentence is rejected as not established by competent substantial evidence. The exact nature of the program and the Devine's participation in it were not clearly established.
81. Rejected as unnecessary and subordinate to Findings of Fact 26 and 65.
82. Addressed in the Preliminary Statement.
83-87 Rejected as a summary of testimony rather than Findings of Fact. The subject matter is addressed in Findings of Fact 67.
88. Rejected as constituting argument.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA

STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCE BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DIVISION OF ADMINISTRATIVE HEARINGS AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, OR WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF RENDITION OF THE ORDER TO BE REVIEWED. ALTERNATIVELY, A PARTY ADVERSELY AFFECTED BY THIS FINAL ORDER MAY BRING A CIVIL ACTION FILED IN CIRCUIT COURT UNDER SECTION 230.23(4)(m)5, FLORIDA STATUTES (1990 SUPP.), OR BRING A CIVIL ACTION IN FEDERAL COURT.

UNITED STATES CODE
ANNOTATED
TITLE 20. EDUCATION
CHAPTER 33 --EDUCATION OF INDIVIDUALS WITH DISABILITIES
SUBCHAPTER II-- ASSISTANCE FOR EDUCATION OF ALL CHILDREN WITH DISABILITIES

Current through P.L. 107-7, approved 4-12-01

§ 1415. Procedural safeguards.

(a) Establishment of procedures

Any State educational agency, State agency, or local educational agency that receives assistance under this subchapter shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies.

(b) Types of procedures

The procedures required by this section shall include --

(1) an opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meeting with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education by such agencies.

Types of procedures

The procedures required by this section shall include--

an opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

procedures to protect the rights of the child whenever the parents of the child are not known, the agency cannot, after reasonable efforts, locate the parents, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, the local educational agency, or any other agency that is involved in the education or care of the child) to act as a surrogate for the parents;

written prior notice to the parents of the child whenever such agency

proposes to initiate or change; or

refuses to initiate or change;

the identification, evaluation, or educational placement of the child, in accordance with subsection (c) of this section, or the provision of a free appropriate public education to the child;

procedures designed to ensure that the notice required by paragraph (3) is in the native language of the parents, unless it clearly is not feasible to do so;

an opportunity for mediation in accordance with subsection (e) of this section;

an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child;

procedures that require the parent of a child with a disability, or the attorney representing the child, to provide notice (which shall remain confidential)--

to the State educational agency or local educational agency, as the case may be, in the complaint filed under paragraph (6); and

that shall include

the name of the child, the address of the residence of the child, and the name of the school the child is attending;

a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem; and

a proposed resolution of the problem to the extent known and available to the parents at the time; and

procedures that require the State educational agency to develop a model form to assist parents in filing a complaint in accordance with paragraph (7).

Content of prior written notice

The notice required by subsection (b)(3) of this section shall include--

a description of the action proposed or refused by the agency;

an explanation of why the agency proposes or refuses to take the action;

a description of any other options that the agency considered and the reasons why those options were rejected;

a description of each evaluation procedure, test, record, or report the agency used as a basis for the proposed or refused action;

a description of any other factors that are relevant to the agency's proposal or refusal; (6) a statement that the parents of a child with a disability have protection under the procedural safe-guards of this subchapter and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained; and

sources for parents to contact to obtain assistance in understanding the provisions of this subchapter.

Procedural safeguards notice

In general

A copy of the procedural safeguards available to the parents of a child with a disability shall be given to the parents, at a minimum-

upon initial referral for evaluation;

upon each notification of an individualized education program meeting and upon reevaluation of the child; and

upon registration of a complaint under subsection (b)(6) of this section.

Contents

The procedural safeguards notice shall include a full explanation of the procedural safeguards, written in the native language of the parents, unless it clearly is not feasible to do so, and written in an easily understandable manner, available under this section and under regulations promulgated by the Secretary relating to--

independent educational evaluation;

prior written notice;

parental consent;

access to educational records;

opportunity to present complaints;

the child's placement during pendency of due process proceedings;

procedures for students who are subject to placement in an interim alternative educational setting;

requirements for unilateral placement by parents of children in private schools at public expense;

mediation;

due process hearings, including requirements for disclosure of evaluation results and recommendations;

State-level appeals (if applicable in that State);

civil actions; and

attorneys' fees.

Mediation

In general

Any State educational agency or local educational agency that receives assistance under this subchapter shall ensure that procedures are established and implemented to allow parties to disputes involving any matter described in subsection (b)(6) of this section to resolve such disputes through a mediation process which, at a minimum, shall be available whenever a hearing is requested under subsection (f) or (k) of this section.

*168356 Requirements

Such procedures shall meet the following requirements:

The procedures shall ensure that the mediation process is voluntary on the part of the parties;

is not used to deny or delay a parent's right to a due process hearing under subsection (f) of this section, or to deny any other rights afforded under this subchapter; and

is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

A local educational agency or a State agency may establish procedures to require parents who choose not to use the mediation process to meet, at a time and location convenient to the parents, with a disinterested party who is under contract with-

a parent training and information center or community parent resource center in the State established under section 1482 or 1483 of this title; or

an appropriate alternative dispute resolution entity;

to encourage the use, and explain the benefits, of the mediation process to the parents.

The State shall maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services.

The State shall bear the cost of the mediation process, including the costs of meetings described in subparagraph (B).

Each session in the mediation process shall be scheduled in a timely manner and shall be held in a location that is convenient to the parties to the dispute.

An agreement reached by the parties to the dispute in the mediation process shall be set forth in a written mediation agreement.

Discussions that occur during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings and the parties to the mediation process may be required to sign

a confidentiality pledge prior to the commencement of such process.

Impartial due process hearing

In general

***168357** Whenever a complaint has been received under subsection (b)(6) or (k) of this section, the parents involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.

Disclosure of evaluations and recommendations

In general

At least 5 business days prior to a hearing conducted pursuant to paragraph (1), each party shall disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing.

Failure to disclose

A hearing officer may bar any party that fails to comply with subparagraph (A) from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

Limitation on conduct of hearing

A hearing conducted pursuant to paragraph (1) may not be conducted by an employee of the State educational

agency or the local educational agency involved in the education or care of the child.

Appeal

If the hearing required by subsection (f) of this section is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision to the State educational agency. Such agency shall conduct an impartial review of such decision. The officer conducting such review shall make an independent decision upon completion of such review.

Safeguards

Any party to a hearing conducted pursuant to subsection (f) or (k) of this section, or an appeal conducted pursuant to subsection (g) of this section, shall be accorded-

the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

the right to present evidence and confront, cross-examine, and compel the attendance of witnesses;

the right to a written, or, at the option of the parents, electronic verbatim record of such hearing; and

the right to written, or, at the option of the parents, electronic findings of fact and decisions (which findings and decisions shall be made available to the public consistent with the requirements of section 1417(c) of this title (relating to the confidentiality of data, information, and

records) and shall also be transmitted to the advisory panel established pursuant to section 1412(a)(21) of this title).

***168358** Administrative procedures

In general

Decision made in hearing

A decision made in a hearing conducted pursuant to subsection (f) or (k) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (g) of this section and paragraph (2) of this subsection.

Decision made at appeal

A decision made under subsection (g) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

Right to bring civil action

In general

Any party aggrieved by the findings and decision made under subsection (f) or (k) of this section who does not have the right to an appeal under subsection (g) of this section, and any party aggrieved by the findings and decision under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

Additional requirements

In any action brought under this paragraph, the court--

shall receive the records of the administrative proceedings;

ii) shall hear additional evidence at the request of a party; and

basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

Jurisdiction of district courts; attorneys' fees

In general

The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy.

Award of attorneys' fees

In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party.

Determination of amount of attorneys' fees

***168359** Fees awarded under this paragraph shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be

used in calculating the fees awarded under this subsection.

Prohibition of attorneys' fees and related costs for certain services

Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent if--

the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

the offer is not accepted within 10 days; and

the court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless such meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for a mediation described in subsection (e) of this section that is conducted prior to the filing of a complaint under subsection (b)(6) or (k) of this section.

Exception to prohibition on attorneys' fees and related costs

Notwithstanding subparagraph (D), an award of attorneys' fees and related costs may be made to a parent who is the

prevailing party and who was substantially justified in rejecting the settlement offer.

Reduction in amount of attorneys' fees

Except as provided in subparagraph (G), whenever the court finds that--

the parent, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

the time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

the attorney representing the parent did not provide to the school district the appropriate information in the due process complaint in accordance with subsection (b)(7) of this section;

***168360** the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this section.

Exception to reduction in amount of attorneys' fees

The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

Maintenance of current educational placement

Except as provided in subsection (k)(7) of this section, during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

Placement in alternative educational setting

Authority of school personnel

School personnel under this section may order a change in the placement of a child with a disability

to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days (to the extent such alternatives would be applied to children without disabilities); and

to an appropriate interim alternative educational setting for the same amount of time that a child without a disability would be subject to discipline, but for not more than 45 days if---

the child carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a State or a local educational agency; or

the child knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school

or a school function under the jurisdiction of a State or local educational agency.

Either before or not later than 10 days after taking a disciplinary action described in subparagraph (A)-

if the local educational agency did not conduct a functional behavioral assessment and implement a behavioral intervention plan for such child before the behavior that resulted in the suspension described in subparagraph (A), the agency shall convene an IEP meeting to develop an assessment plan to address that behavior; or

*168361 if the child already has a behavioral intervention plan, the IEP Team shall review the plan and modify it, as necessary, to address the behavior.

Authority of hearing officer

A hearing officer under this section may order a change in the placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 days if the hearing officer-

determines that the public agency has demonstrated by substantial evidence that maintaining the current placement of such child is substantially likely to result in injury to the child or to others;

considers the appropriateness of the child's current placement;

considers whether the public agency has made reasonable efforts to minimize the risk of harm in the child's current placement, including the use of supplementary aids and services; and

determines that the interim alternative educational setting meets the requirements of paragraph (3)(B).

Determination of setting

In general

The alternative educational setting described in paragraph (1)(A)(ii) shall be determined by the IEP Team.

Additional requirements

Any interim alternative educational setting in which a child is placed under paragraph (1) or (2) shall--

be selected so as to enable the child to continue to participate in the general curriculum, although in another setting, and to continue to receive those services and modifications, including those described in the child's current IEP, that will enable the child to meet the goals set out in that IEP; and

include services and modifications designed to address the behavior described in paragraph (1) or paragraph (2) so that it does not recur.

Manifestation determination review

In general

If a disciplinary action is contemplated as described in paragraph (1) or paragraph (2) for a behavior of a child with a disability described in either of those paragraphs, or if a disciplinary action involving a change of placement for more than 10 days is contemplated for a child with a disability who has engaged in other behavior that violated

any rule or code of conduct of the local educational agency that applies to all children-

***168362** not later than the date on which the decision to take that action is made, the parents shall be notified of that decision and of all procedural safeguards accorded under this section; and

immediately, if possible, but in no case later than 10 school days after the date on which the decision to take that action is made, a review shall be conducted of the relationship between the child's disability and the behavior subject to the disciplinary action.

Individuals to carry out review

A review described in subparagraph (A) shall be conducted by the IEP Team and other qualified personnel.

Conduct of review

In carrying out a review described in subparagraph (A), the IEP Team may determine that the behavior of the child was not a manifestation of such child's disability only if the IEP Team--

first considers, in terms of the behavior subject to disciplinary action, all relevant information, including--

evaluation and diagnostic results, including such results or other relevant information supplied by the parents of the child;

observations of the child; and

the child's IEP and placement; and

then determines that--

in relationship to the behavior subject to disciplinary action, the child's IEP and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement;

the child's disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to disciplinary action; and

the child's disability did not impair the ability of the child to control the behavior subject to disciplinary action.

Determination that behavior was not manifestation of disability

In general

If the result of the review described in paragraph (4) is a determination, consistent with paragraph (4)(C), that the behavior of the child with a disability was not a manifestation of the child's disability, the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner in which they would be applied to children without disabilities, except as provided in section 1412(a)(1) of this title.

***168363** Additional requirement

If the public agency initiates disciplinary procedures applicable to all children, the agency shall ensure that the special education and disciplinary records of the child with a disability are transmitted for consideration by the person

or persons making the final determination regarding the disciplinary action.

Parent appeal

In general

If the child's parent disagrees with a determination that the child's behavior was not a manifestation of the child's disability or with any decision regarding placement, the parent may request a hearing.

The State or local educational agency shall arrange for an expedited hearing in any case described in this subsection when requested by a parent.

Review of decision

In reviewing a decision with respect to the manifestation determination, the hearing officer shall determine whether the public agency has demonstrated that the child's behavior was not a manifestation of such child's disability consistent with the requirements of paragraph (4)(C).

In reviewing a decision under paragraph (1)(A)(ii) to place the child in an interim alternative educational setting, the hearing officer shall apply the standards set out in paragraph (2).

Placement during appeals

In general

When a parent requests a hearing regarding a disciplinary action described in paragraph (1)(A)(ii) or paragraph (2) to challenge the interim alternative educational setting or the manifestation determination, the

child shall remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period provided for in paragraph (1)(A)(ii) or paragraph (2), whichever occurs first, unless the parent and the State or local educational agency agree otherwise.

Current placement

If a child is placed in an interim alternative educational setting pursuant to paragraph (1)(A)(ii) or paragraph (2) and school personnel propose to change the child's placement after expiration of the interim alternative placement, during the pendency of any proceeding to challenge the proposed change in placement, the child shall remain in the current placement (the child's placement prior to the interim alternative educational setting), except as provided in subparagraph (C).

***168364** Expedited hearing

If school personnel maintain that it is dangerous for the child to be in the current placement (placement prior to removal to the interim alternative education setting) during the pendency of the due process proceedings, the local educational agency may request an expedited hearing.

In determining whether the child may be placed in the alternative educational setting or in another appropriate placement ordered by the hearing officer, the hearing officer shall apply the standards set out in paragraph (2).

Protections for children not yet eligible for special education and related services

In general

A child who has not been determined to be eligible for special education and related services under this subchapter and who has engaged in behavior that violated any rule or code of conduct of the local educational agency, including any behavior described in paragraph (1), may assert any of the protections provided for in this subchapter if the local educational agency had knowledge (as determined in accordance with this paragraph) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

Basis of knowledge

A local educational agency shall be deemed to have knowledge that a child is a child with a disability if-

the parent of the child has expressed concern in writing (unless the parent is illiterate or has a disability that prevents compliance with the requirements contained in this clause) to personnel of the appropriate educational agency that the child is in need of special education and related services;

the behavior or performance of the child demonstrates the need for such services;

(iii) the parent of the child has requested an evaluation of the child pursuant to section 1414 of this title; or

the teacher of the child, or other personnel of the local educational agency, has expressed concern about the behavior or performance of the child to the director of special education of such agency or to other personnel of the agency.

Conditions that apply if no basis of knowledge

***168365** In general

If a local educational agency does not have knowledge that a child is a child with a disability (in accordance with subparagraph (B)) prior to taking disciplinary measures against the child, the child may be subjected to the same disciplinary measures as measures applied to children without disabilities who engaged in comparable behaviors consistent with clause (ii).

Limitations

If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures under paragraph (1) or (2), the evaluation shall be conducted in an expedited manner. If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the agency and information provided by the parents, the agency shall provide special education and related services in accordance with the provisions of this subchapter, except that, pending the results of the evaluation, the child shall remain in the educational placement determined by school authorities.

Referral to and action by law enforcement and judicial authorities

Nothing in this subchapter shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability.

An agency reporting a crime committed by a child with a disability shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom it reports the crime.

Definitions

For purposes of this subsection, the following definitions apply:

Controlled substance

The term "controlled substance" means a drug or other substance identified under schedules 1, 11, III, IV, or V in section 812(c) of Title 21.

Illegal drug

The term "illegal drug"--

means a controlled substance; but

*168366 does not include such a substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal law.

Substantial evidence

The term "substantial evidence" means beyond a preponderance of the evidence.

Weapon

The term "weapon" has the meaning given the term "dangerous weapon" under paragraph (2) of the first subsection (g) of section 930 of Title 18.

Rule of construction

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C.A. §12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C.A. §791 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

Transfer of parental rights at age of majority

In general

A State that receives amounts from a grant under this subchapter may provide that, when a child with a disability reaches the age of majority under State law (except for a child with a disability who has been determined to be incompetent under State law)-

the public agency shall provide any notice required by this section to both the individual and the parents;

all other rights accorded to parents under this subchapter transfer to the child;

the agency shall notify the individual and the parents of the transfer of rights; and

all rights accorded to parents under this subchapter transfer to children who are incarcerated in an adult or juvenile Federal, State, or local correctional institution.

Special rule

If, under State law, a child with a disability who has reached the age of majority under State law, who has not been determined to be incompetent, but who is determined not to have the ability to provide informed consent with respect to the educational program of the child, the State shall establish procedures for appointing the parent of the child, or if the parent is not available, another appropriate individual, to represent the educational interests of the child throughout the period of eligibility of the child under this subchapter. ***168367**

CREDIT(S)

1999 Main Volume

(Pub.L. 91-230, Title v1, § 615, as added Pub.L. 105-17, Title I, § 101, June 4, 1997, 111 Slat. 88, and amended Pub.L. 106-25, § 6(a), Apr. 29, 1999, 113 Stat. 49.)

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL NOTES

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1997 Acts. House Report No. 105-5, see 1997 U.S. Code Cong. and Adm. News, p. 3.

House Report No. 105-95 and Statement by President, see 1997 U.S. Code Cong. and Adm. News, p. 78.

1999 Acts. House Report No. 106-43 and House Conference Report No. 106-100, see 1999 U.S. Code Cong. and Adm. News, p. 9.

Codifications

Title VI of Pub.- 91-230, as amended by Pub.l. 105-17, is set out as subchapters I to IV of this chapter consisting of sections 1400 to 1487 of this title. These sections are shown as having been added by Pub.L. 105-17 without reference to the intervening amendments to Pub.L. 91-230 between 1970 and 1997 because of the extensive revision of the provisions of Pub.L. 91-230 pursuant to Pub.L. 105-17.

Amendments

1999 Amendments. Subsec. (k)(1)(A)(ii) (1). Pub.L. 106-25, § 6(a), rewrote item (I), which formerly read: "the child carries a weapon to school or to a school function under the jurisdiction of a State or a local educational agency; or.

Effective and Applicability Provisions

1999 Acts. Pub.L. 106-25, § 6(b), Apr. 29, 1999, 113 Stat. 49, provided that: "(b) Application.--The amendment made by subsection (a) [amending this section] shall apply to conduct occurring not earlier than the date of the enactment of this Act [Apr. 29, 1999].

1997 Acts. Section effective June 4, 1997, see section 201 (a) of Pub. L. 105-17, set out as a note under section 1400 of this title.

***168368** Prior Provisions

A prior section 1415, Pub.L. 91-230, Title VI, § 615, as added Pub.L. 94-142, § 5(a), Nov. 29, 1975, 89 Stat. 788, and amended Pub.L. 99-372, §§ 2, 3, Aug. 5, 1986, 100 Stat. 796, 797; Pub.L. 100-630, Title 1, § 102(e), Nov. 7, 1988, 102 Stat. 3294; Pub.L. 101-476, Title IX, § 901(b)(71) to (75), Oct. 30, 1990, 104 Stat. 1145; Pub.L. 102-119, 25(b), Oct. 7, 1991, 105 Stat. 607; Pub.L. 103-382, Title III, § 314(a)(1), Oct. 20, 1994, 108 Stat. 3936, was omitted in the general amendment of Pub.L. 91-230, Title VI, § 615 by Pub.L. 105-17, Title I, § 101, June 4, 1997, 111 Stat. 88, and provided:

Procedural safeguards

(a) Establishment and maintenance

Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that children with disabilities and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

(b) Required procedures; hearing

(1) The procedures required by this section shall include, but shall not be limited to--

(A) an opportunity for the parents or guardian of a child with a disability to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

*168369 (C) written prior notice to the parents or guardian of the child whenever such agency or unit-

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully informs the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or

educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

(c) Review of local decision by State educational agency

If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

(d) Enumeration of rights accorded parties to hearings

Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded-

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities,

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses,

*168370 (3) the right to a written or electronic verbatim record of such hearing, and

(4) the right to written findings of fact and decisions (which findings and decisions shall be made available to the public consistent with the requirements of section 1417(c) of this title and shall also be transmitted to the advisory panel established pursuant to section 1413(a)(12) of this title).

(e) Civil action; jurisdiction

(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence

at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3)(A) Except as provided in subparagraph (B), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(B)(i) Except as provided in clause (iii), if the proceedings conducted pursuant to this section involve a child with a disability who is determined to have brought a weapon to school under the jurisdiction of such agency, then the child may be placed in an interim alternative educational setting, in accordance with State law, for not more than 45 days.

***168371** (ii) The interim alternative educational setting described in clause (i) shall be decided by the individuals described in section 1401(a)(20) of this title.

(iii) If a parent or guardian of a child described in clause (i) requests a due process hearing pursuant to paragraph (2) of subsection (b) of this section, then the child shall remain in the alternative educational setting described in such clause during the pendency of any proceedings conducted pursuant to this section, unless the parents and the local educational agency agree otherwise.

(iv) For the purpose of this section, the term 'weapon' means a firearm as such term is defined in section 921 of Title 18.

(4)(A) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

(B) In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a child or youth with a disability who is the prevailing party.

(C) For the purpose of this subsection, fees awarded under this subsection shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) No award of attorneys' fees and related costs may be made in any action or proceeding under this subsection for services performed subsequent to the time of a written offer of settlement to a parent or guardian, if-

(i) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than ten days before the proceeding begins;

(ii) the offer is not accepted within ten days; and "(iii) the court or administrative officer finds that the relief finally obtained by the parents or guardian is not more favorable to the parents or guardian than the offer of settlement.

(E) Notwithstanding the provisions of subparagraph (D), an award of attorneys' fees and related costs may be made to a parent or guardian who is the prevailing party and who was substantially justified in rejecting the settlement offer.

*168372 (F) Whenever the court finds that--

(i) the parent or guardian, during the course of the action or proceeding, unreasonably protracted the final res 'ution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, experience, and reputation; or

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding,

the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this subsection.

(G) The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

(f) Effect on other laws

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under

the Constitution, title V of the Rehabilitation Act of 1973 [29 U.S.C.A. § 790 et seq.], or other Federal statutes protecting the rights of children and youth with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (b)(2) and (c) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter

Pub.L. 105-17, Title 11, § 201(a)(2)(C), June 4, 1997, 111 Stat. 156, provided in part that the provisions (of which this prior section 1415 was a part) relating to individualized education programs and the State's comprehensive system of personnel development, as in effect on the day before June 4, 1997, shall remain in effect until July 1, 1998.

GAO Study of Attorneys' Fees Provision

Section 4 of Pub.L. 99-372, as amended Pub.L. 101-476, Title IX, § 901(a)(2), (3), Oct. 30, 1990, 104 Stat. 1142, provided that:

***168373** (a) The Comptroller General of the United States, through the General Accounting Office, shall conduct a study of the impact of the amendments to the Individuals with Disabilities Education Act made by section 2 of this Act [amending subsec. (e)(4) of this section]. Not later than June 30, 1989, the Comptroller General shall submit a report containing the findings of such study to the Committee on Education and Labor of the House of Representatives and the Committee on Labor and Human Resources of the Senate. The Comptroller General shall conduct a formal briefing for such Committees on the status of the study not later than March 1, 1988. Such report shall include the information described in subsection (b).

(b) The report authorized under subsection (a) shall include the following information:

(1) The number, in the aggregate and by State, of written decisions under sections 615(6)(2) and (c) [subsecs. (b)(2) and (c) of this section] transmitted to State advisory panels under section 615(d)(4) [subsec. (d)(4) of this section] for fiscal years 1984 through 1988, the prevailing party in each such decision, and the type of complaint. For fiscal year 1986, the report shall designate which decisions concern complaints filed after the date of the enactment of this Act [Aug. 5, 1986].

(2) The number, in the aggregate and by State, of civil actions brought under section 615(e)(2) [subsec. (e)(2) of this section], the prevailing party in each action, and the type of complaint for fiscal years 1984 through 1988. For fiscal year 1986 the report shall designate which decisions concern complaints filed after the date of enactment [Aug. 5, 1986].

(3) Data, for a geographically representative selective sample of States, indicating (A) the specific amount of attorneys' fees, costs, and expenses awarded to the prevailing party, in each action and proceeding under section 615(e)(4)(B) [subsec. (e)(4)(B) of this section] from the date of the enactment of this Act [Aug. 5, 1986] through fiscal year 1988, and the range of such fees, costs, and expenses awarded in the actions and proceedings under such section, categorized by type of complaint and (B) for the same sample as in (A) the number of hours spent by personnel, including attorneys and consultants, involved in the action or proceeding, and expenses incurred by the parents and the State educational agency and local educational agency.

(4) Data, for a geographically representative sample of States, on the experience of educational agencies in resolving complaints informally under section 615(6)(2) [subsec. (b)(2) of this section], from the date of the enactment of this Act [Aug. 5, 1986] through fiscal year 1988.

[Any reference in any provision of law enacted before Jan. 4, 1995, to the Committee on Education and Labor of the House of Representatives treated as referring to the Committee on Economic and Educational Opportunities of the House of Representatives, see section 1(a)(3) of Pub.L. 104-14, set out as a note preceding section 21 of Title 2, The Congress.]

***168374**

REFERENCES

AMERICAN LAW REPORTS

AIDS infection as affecting right to attend public school. 60 ALR 4th 15.

Physical or mental illness as basis of dismissal of student from school, college, or university. 17 ALR 4th 519.

Requisite conditions and appropriate factors affecting educational placement of handicapped children. 23 ALR 4th 740.

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Validity of, and sufficiency of compliance with, state standards for approval of private school to receive public placements of students or reimbursement for their educational costs. 48 ALR 4th 1231.

Actions, under 42 USCA § 1983, for violations of federal statutes pertaining to rights of handicapped persons. 63 ALR Fed 215.

Appropriateness of state administrative procedures under § 615 of Education for All Handicapped Children Act (20 USCA § 1415). 64 ALR Fed 792.

Award of attorneys' fees pursuant to §615(e)(4) of the Education of the Handicapped Act (20 USCA § 1415(e)(4)), as amended by the Handicapped Children's Protection Act of 1986. 87 ALR Fed 500.

Construction and application of Architectural Barriers Act (42 USCA §§ 4151 to 4157) providing for design and construction of public buildings to accommodate physically handicapped. 78 ALR Fed 877.

Construction and application of Civil Rights Attorney's Fees Awards Act of 1976 (amending 42 USCA § 1988), providing that court may allow prevailing party, other than United States, reasonable attorney's fee in certain civil rights actions. 43 ALR Fed 243.

Construction and effect of § 504 of the Rehabilitation Act of 1973 (29 USCA § 794) prohibiting discrimination against otherwise qualified handicapped individuals in specified programs or activities. 44 ALR Fed 148.

Supreme Court, U.S.
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No. 01-1659

In The

Supreme Court of the United States

WILLIAM J. DEVINE, THERESA DEVINE,
and JOHN DEVINE,
a minor by and through his parents,
William J. Devine and Terry Devine,

Petitioners,

v.

INDIAN RIVER COUNTY SCHOOL BOARD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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July 18, 2002

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QUESTION PRESENTED

On appeal of the result of a due process hearing conducted pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. § 1415(f), does 20 U.S.C. § 1415(i)(2)(B) permit a federal district court to require the parties to re-offer live testimony and evidence rather than review the record of the administrative hearing?

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20 U.S.C. § 1415(i)(2)(B) 9, 14, 15

RESPONSE TO PETITIONERS' "STATEMENT"

Petitioners' "STATEMENT" inaccurately describes the nature of the proceedings below and evidences a misunderstanding of what the District Court requested of the parties in presenting their cases.

Petitioner John Devine has been diagnosed with autism and is therefore eligible for special education services under the Individuals with Disabilities Education Act (IDEA) 20 U.S.C. § 1400 et seq. John's parents, Petitioners William J. Devine and Theresa Devine, did not agree with Respondent Indian River County School Board's proposed individualized education program (IEP) for the 1992-93 school year because it did not provide for a residential placement for John as the parents had demanded. In September, 1992, the parents requested a due process hearing pursuant to 20 U.S.C. § 1415.

The due process hearing was conducted on April 12-15, 1993. The final order was entered on September 21, 1993. At the end of the 1992-93 school year prior to entry of the final order, Mr. and Mrs. Devine removed John from the Indian River County school district and moved to Massachusetts where they enrolled him in the May Institute beginning with the 1993-94 school year. The May Institute is a residential placement paid for by the state of Massachusetts and the local school district in Massachusetts where the Devines resided. John turned 14 on May 10, 1993.

The hearing officer denied the parents' request for the residential placement, ruling that it was not necessary to provide John with an appropriate education. The hearing officer ruled that the 1992-93 IEP did not provide John with a free appropriate public education because it failed

to coordinate protocols and methods used in school with those used at home; failed to provide transition services from school to post school activities; and failed to accommodate John's entry into puberty.

Pursuant to 20 U.S.C. § 1415 (i)(2) the parents appealed the hearing officer's ruling on the residential placement denial and the School Board appealed the ruling concerning the appropriateness of the IEP. The parents asked for an award of attorney's fees, claiming to be the prevailing party in the due process hearing. They also asked the court for a judgment holding Respondent Indian River County School Board responsible for the residential placement at the May Institute even though the state and local school district in Massachusetts were paying for the placement. The Respondent School Board appealed the hearing officer's ruling that the 1992-93 IEP did not provide a free appropriate public education. Ultimately both appeals were consolidated into one action before the Federal District Court for the Southern District of Florida.

On December 2, 1994, the parties filed a Joint Pretrial Stipulation. On Petitioners' Schedule of Exhibits attached to the Joint Pretrial Stipulation, Petitioners listed exhibits 1 through 112 from the due process hearing and additional exhibits Nos. 113 through 259. The Respondent School Board's Schedule of Exhibits listed exhibits 1 through 40 introduced at the due process hearing and additional exhibits Nos. 41 through 57. Petitioners' witness list included five "trial witnesses from the underlying Administrative Hearing" plus ten new witnesses. Respondent's witness list included five names, three of whom testified at the due process hearing. Petitioners only objected to four exhibits and no objections to the witnesses were made.

The parties estimated that the time for trial would be from three to four days.

The trial began on February 21, 1995, and lasted four days, recessing on February 24, 1995, without concluding. The trial resumed and concluded on October 20 1998. The lengthy delay was primarily the result of Petitioners' interlocutory appeal of the trial court's denial of Petitioners' counsel's motion to withdraw.

Contrary to the assertions of Petitioners, at no place in the record did the district court state "that it would not review and rely on the administrative record," nor did the district court state "that it would require the parties to retry the case by bringing in live witnesses." The district court did express its preference for live testimony instead of reviewing depositions and transcripts. The court expressed a desire to have them read into the record. The entire record of the due process hearing was, in fact, filed with the court by Petitioners on December 8, 1994 and is part of the record.

While the court did state that the lawyers "ought to try this case as if this is the trial," it later explained what it meant. When Petitioners' counsel expressed to the court his understanding that "the court is desirous for us to have all the witnesses live and putting on their testimony before the court," the court gave further clarification. The court instructed the lawyers simply to identify what portions of the depositions or transcripts that they really wanted the court to consider. If there was "fat" in the record, then the lawyers should identify only those portions that needed to be reviewed for the court to "decide the case fairly."

On the morning of the second day of the trial, Mr. Devine and Petitioners' counsel were still confused about how the court wanted to proceed. Petitioners' counsel objected to the procedure that he thought the court was requiring. Counsel complained that he thought he was only going to have to supplement what was introduced in the due process hearing, but now the court was requiring that he put it all on again in addition to the supplemental evidence. The court explained that all it wanted was for the attorneys to eliminate the "fat" in the record so that the court could get to the "meat" of the issues.

Petitioners' counsel stated that in order to do that he "would need to go back through each and every exhibit and present the case in that fashion." The court responded emphatically as follows:

> Untrue. That is folderol that you have to come in here with extraneous, irrelevant or unnecessary material. If you are a good lawyer you can do it. If you do not want to do that, that is another ball game. And that is what I am beginning to detect.

Counsel continued to insist that to do what he thought the court wanted, he would have to bring in "a great number of witnesses that we have not yet listed" to present "the distilled version or [sic] those elements that are important in this case." Counsel then requested that the court allow Mr. Devine to read a statement to the court. The court denied that request and then counsel moved to withdraw as attorney of record. After receiving the *ore tenis* motion to withdraw, the court allowed Mr. Devine to address the court directly and explain his position.

Mr. Devine explained that as he understood it, the court was requiring a new trial where all of the evidence

presented at the due process hearing would have to be presented again to the court. He stated to the court that the court "will hear the testimony of each witness who appeared in the original hearing on both sides." The Court responded by stating "Maybe and maybe not. I can protect myself from repetitive testimony. . . . "

Mr. Devine continued to misunderstand the court's position and stated that he "would like to have the opportunity to re-enter all the exhibits that were presented in the due process hearing along with any new exhibits" and requested a continuance so that he could prepare. The court informed Mr. Devine that he was proceeding in the wrong manner. The court denied counsel's motion to withdraw and then stated the following:

> I suggested the procedure I suggested yesterday because it is the speedy way and efficient way to resolve this matter. What you are proposing is an interminable tunnel without light at the end of it. And I am not doing it that way.

The trial lasted a total of five days, only one day longer than estimated in the Joint Pretrial Stipulation. Although Petitioners listed ten witnesses that they intended to call at the federal court trial (two of whom testified at the due process hearing), they, in fact, only called two witnesses, only one of whom had testified at the due process hearing. Petitioners never introduced any witnesses who testified at the due process hearing for the purpose of giving the same testimony again or introducing the exhibits that were presented in the due process hearing.

The court entered its Final Judgment on July 30, 1999. On the primary issue of the requested residential

placement, the court agreed with the hearing officer that a residential placement was not necessary in order to provide John Devine with a free appropriate public education. The court disagreed with the hearing officer's determination that the 1992-93 IEP failed to provide an appropriate education. In reaching its decision, there is no evidence that the court did not receive and consider the records of the administrative proceedings.

The Civil Docket indicates that the record from the due process hearing was filed by Petitioners on December 8, 1994. Although Petitioners did not comply with the court's suggestion of identifying those portions of the administrative record that the parties really intended to rely upon, there is no evidence that the court refused to consider evidence submitted by Petitioners at the due process hearing.

To the contrary, the court specifically stated that its decision was in part based "upon consideration of the administrative record." The court noted that Petitioners' expert, Dr. Amy Weatherby, testified at the due process hearing and described the essence of some of her testimony at the due process hearing. The court stated that the hearing officer also relied heavily upon the testimony of Petitioners' expert "on the needs of autistic children generally." The court also noted that "the evidence presented at the administrative level and the subsequent hearing fails to support" any claim that the Respondent School Board failed to comply with the procedures set forth in the IDEA.

On appeal to the Eleventh Circuit Court Of Appeals, Petitioners raised the issue that "the trial court erred by requiring that the parties retry the case, and by refusing

to receive the records of the administrative proceeding." The Eleventh Circuit responded to that assertion in a footnote as follows:

> Plaintiffs argue that the district court refused to consider the administrative record and to give the weight to the findings and conclusions of the hearing officer. It, however, was within the district court's discretion to prefer live testimony over that of depositions and, in the event live testimony was not possible, to require the depositions to be read into the record. Plaintiffs' assertion that the district court ignored the administrative record is belied by the court's final order, which extensively referred to the administrative record and specifically cited testimony given by Dr. Amy Weatherby, who did not testify before the district court.

REASONS WHY THE PETITION SHOULD BE DENIED

Certiorari should be denied because the facts and reasons set forth in the Petition as the basis for granting certiorari review simply do not exist. Petitioners are asking this court to grant certiorari of a proceeding that is totally mischaracterized and review purely fictional rulings of the district court described in the Petitioners' STATEMENT beginning on page four.

MISCHARACTERIZED PROCEEDINGS

The Petitioners' STATEMENT characterizes the proceedings at the due process level as Mr. and Mrs.

Devine objecting to the proposed IEP for the 1992-93 school year claiming that it did not provide a free appropriate public education. They claimed that the hearing officer agreed with them by ruling that the proposed IEP was not appropriate. They accurately assert that Respondent sought review of that decision. They also accurately state that they filed an action in the federal district court "seeking damages, fees and costs and *additional eligibility and relief* under the IDEA." (Emphasis added).

What they intentionally omit is that the hearing officer also ruled that the Devines were not entitled to the residential placement for their son that they had demanded from the School Board. The primary thrust of the proceeding always was to get a residential placement for their son. The so-called "*additional eligibility and relief*" requested in their appeal to the district court was specifically for the court to reverse the hearing officer's ruling that the residential placement was not necessary. That the residential placement was the paramount concern of the Petitioners is evident from a reading of the hearing officer's Final Order, the district court's Final Judgment and the decision of the Eleventh Circuit Court of Appeals.

Petitioners also omit the fact that the proceedings were about the IEP for one school year (1992-93) when John Devine turned four[illegible]n years old. He is now 23 years old. They omit the fact that they moved to Massachusetts after the 1992-93 school year and that the State of Massachusetts and the local school district in which they resided paid for the residential placement at the May Institute. They omit the fact that they were requesting that the district court require the Respondent School Board to pay for that residential placement even though it

was already being provided at no cost to the Devines pursuant to the IDEA.

FICTIONAL RULINGS

A. The District Court Refused to Accept, Review, and Give Consideration to the Record of the Due Process Proceedings.

Petitioners are also requesting that this court review fictional rulings of the district court that never occurred. First, the Petitioners claim that the district court refused to accept and review the record of the due process proceedings and give it due consideration. On page five of the Petition they assert that the district court stated "that it would not review and rely on the administrative record." On page 16 of the Petition they claimed that "the court clearly indicated to the parties that it would not accept the administrative record as the basis of the appeal." If that had been the case, the Respondent would have informed the court that under 20 U.S.C. § 1415(i)(2)(B) the court is required to "receive the records of the administrative proceedings."

On page seven of the Petition, Petitioners allege that "it is clear from its instructions to the parties . . . that the court did not read or give any weight to the overwhelming majority of the administrative record." On page 17 they state that "it is clear from the decision that the court ignored most of the record."

The simple fact is that the Petitioners cannot point to any place in the record to support their assertions that the court refused to accept, review, and give consideration to the record of the due process hearing. In fact the record

affirmatively reflects to the contrary. The Civil Docket reflects that the entire record of the due process hearing was filed by the Petitioners on December 8, 1994, before the trial began. The court affirmatively indicated in the Final Judgment that it considered the administrative record in reaching the findings of fact and conclusions of law. Petitioners would have this Court presume that the trial judge misrepresented that fact without any support in the record for such position.

Moreover, the Final Judgment reflects that the court received and reviewed the record from the administrative hearing. For example, Petitioners did not produce Dr. Amy Weatherby to testify live at the district court trial, yet the court cites her testimony from the administrative hearing to the effect that she found that the 1992-93 IEP failed to provide John Devine with a free appropriate public education. The court noted that her conclusion was based "on limited observation of John and without consulting his teachers or requesting the documentation underlying the IEP." The Final Judgment even points out that Dr. Weatherby testified during the administrative proceeding to the effect that a residential placement might only be temporary with the eventual placement being back in the home with proper coordination. The court could not have known that without reviewing the record of the due process hearing.

Finally, Petitioners try to present this case as one where the district court totally ignored the decision and reasoning of the hearing officer in the due process proceedings and substituted its judgment for that of the hearing officer. This, of course, is not the case and ignores the fact that the main thrust of the due process proceedings was to secure a residential placement for John Devine as demanded

by his parents. On the major issue of the residential placement, the district court agreed with the hearing officer's conclusion that residential placement was not necessary. It was only on the minor issue of what services should be in the IEP that the district court disagreed with the hearing officer. Petitioners cannot legitimately claim that the court did not give consideration to the hearing officer's ruling when it accepted the hearing officer's ruling on the most important issue – residential placement.

While there may be a basis for this Court to accept a case for review where an appellate court upholds a district court's ruling that it would not accept, review, and give consideration to the record of the due process hearing, review on such a basis should wait until there is a case where that actually happened. This is certainly not that case.

B. The District Court Required the Parties to Retry the Case.

The Petitioners claim that the district court required the parties to retry the case. On page five of the Petition they claim that "the district court stated that it would require the parties to retry the case by bringing in live witnesses." On page six they claim that the court informed the parties that they "would be required to conduct a full-blown trial in the federal district court." On page seven the Petitioners state that "the parties proceeded with a virtual re-trial of the due process hearing." The Petition on page 17 asserts that "the parties were required to conduct a lengthy and costly trial de novo of the due process hearing." The record simply does not support these allegations.

As pointed out above in the Response to the Petitioners' "STATEMENT," the Petitioners and their counsel were very confused about how the court wanted the parties to proceed in putting on their cases. They thought that the court wanted them to re-enter all the exhibits and bring back all the witnesses to testify. The court was clear that was not what he was suggesting. When Mr. Devine requested a continuance so that he would have enough time to prepare to re-enter everything from the due process hearing, the court responded by stating "What you are proposing is an interminable tunnel without light at the end of it. And I am not doing it that way."

The court did not want a retrial. It wanted the attorneys to identify what portions of the record were extraneous "fat" and what portions of the record were addressing the real issues for the court to review. The court also wanted those portions of the depositions and transcripts that the attorneys wanted the court to consider to be read to the court. The court, however, did not require the attorneys to do so. This is evident by the fact that the petitioners did not produce Dr. Amy Weatherby to testify again nor did they read any of her previous testimony into the record. Yet, the court extensively noted her testimony and its content in the Final Judgment.

The parties did not proceed "with a virtual re-trial of the due process hearing" as claimed by the Petitioners. The Petitioners called only one witness who testified at the due process hearing. That witness testified about new information that came up after the due process hearing and did not reintroduce the previous testimony. Mr. Devine, the only other witness Petitioners called, testified briefly after portions of his depositions were read into the record by Respondent's counsel. He had not testified

previously. Other than filing the record of the due process proceeding with the court on December 8, 1994, Petitioners presented none of the exhibits introduced at the due process proceeding and produced none of the other witnesses from that proceeding.

Likewise, Respondent did not retry the case from the due process hearing. One of Respondent's witnesses did basically reintroduce her testimony given at the due process hearing; however, there was a good reason for that. Her testimony explained a before-and-after videotape of John Devine at school in Indian River County. It would be most difficult, if not impossible, to follow the explanation given by this witness by reading the transcript and following the videotape at the same time. As the witness did at the due process hearing, she testified while showing the video, explaining what was being seen. At times the witness would pause the video and continue the explanation. Thus, it was appropriate to simply repeat her testimony instead of the court trying to discern what she was talking about from the transcript while playing the video.

Again, while it would be appropriate for this Court to accept a case for certiorari review where an appellate court upholds a district court's ruling that required the parties to a due process hearing to retry the entire case, review on such a basis should wait until there is a case where that actually happened. This is certainly not that case.

ADDITIONAL EVIDENCE

The Petition argues that this is a case of interpreting what is appropriate "additional evidence" as contemplated

by 20 USC § 1415 (i)(2)(B). Petitioners cite many cases addressing the issue of what constitutes "additional evidence," pointing out the differences among the circuits. Here again, it may be appropriate to settle the differences among the circuits as to the appropriate interpretation; however, the appropriate time to do so is when there is a case involving that issue. This is not that case.

If this case did involve the district court ruling that all of the evidence, testimonial and documentary, that was introduced at the due process hearing must be reintroduced for the court to consider it, then the issue of "additional evidence" would be present. As noted above, the court was quite clear that it considered Mr. Devine's proposal to re-enter all the exhibits and witnesses to be "an interminable tunnel without light at the end of it." The court stated that it would not allow that to happen.

Other than the Petitioners' misunderstanding that the court was requiring the parties to reintroduce all of the evidence introduced at the due process hearing, the petitioners have cited no other place where the issue of the interpretation of "additional evidence" was preserved for possible review by this Court. Both Petitioners and Respondent noted in the witness and exhibit lists attached to the pretrial stipulation numerous witnesses and documents that they wanted to introduce as "additional evidence" but no rulings on such "additional evidence" were challenged on appeal so as to be a basis for certiorari review.

CONCLUSION

This case should not be accepted for certiorari review because the question presented is unrelated to this case. The question of whether or not a federal district court can require parties to re-offer live testimony and evidence rather than review the record of the administrative hearing under 20 U.S.C. § 1415 (i)(2)(B) is a hypothetical question with respect to this case. Neither the district court nor the court of appeals ruled that it was proper to require that the evidence introduced at the due process hearing be reintroduced before the district court in lieu of accepting for review the administrative hearing record.

Respectfully submitted.

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